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# T R E A T I S E

UPON THE

LAW AND PROCEEDINGS

IN CASES OF

HIGH TREASON, &c.

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BY A BARRISTER AT LAW.

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L O N D O N :

PRINTED FOR THE AUTHOR,

BY A. STRAHAN AND W. WOODFALL,

LAW PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY,

AND SOLD BY WHIELDON AND BUTTERWORTH,

IN FLEET STREET.

1793.

U S I T A E

LAW AND PROCEEDINGS

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THE REASON

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P R E F A C E.

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**T**HIS cursory treatise upon the law of High Treason is presented to publick perusal, not with the pride of confidence, but with the humility of diffidence; the days of insinuating prefaces are no more; fiction cannot borrow the charms of truth, nor ignorance erect the standard of science. The popular mind, from the gradual diffusion of knowledge, and repeated acts of observation, has acquired the habit of judging for itself; and however circumstances may delay the fall, every work must ultimately stand upon the broad or narrow basis of merit.

Since therefore criticism is no longer reposed in the hands of dulness, nor merit at the mercy of caprice, the Author soothes not the brow of censure by flattery, nor deprecates his sentence by subterfuge; but wishes to atone for the many errors of his work by an early and ingenuous confession. And if the Publick regards with the fondness of a parent, even this mutilated offspring of the brain, such fostering effects cannot fail to brighten his prospects, and excite the liveliest sentiments of gratitude.

But, however despicable the execution may appear, the importance and utility of the subject may perhaps command attention; these laws are not made to strengthen the bloody hands of tyrants, or guard the pavilions of lust; but for the preservation of one, who from the earliest dawn of his reign has watched over and protected the dearest interests of the country, and who sits not on high, surrounded by the might  
and

and terror of Kings, but is enthroned in the hearts of his People.

Since therefore the King, by his virtues and prerogatives, protects the Constitution; the Constitution, in return, protects him by its laws.

Sceptered happiness is not enviable. The prince that embraces the nation as a family, has engagements that never cease, and cares that never end. Every joy gladdens his heart, and every cry pierces his soul. The brightest jewel in the royal diadem is justice, and the fairest flower is mercy. The noblest attribute of the scepter is prerogative, which is not, nor cannot be, invested in the crown, for purposes of oppression, but is continually exerted for the good of the Community.

This is the most awful period that can engage the attention of man; witness the solemn scenes, that are acting upon the theatre of a neighbouring kingdom.

In those polluted spots, where holy altars blazed, clouds of carnage ascend the skies; despair and dismay are the consequences of that fatal catastrophe which annihilated the political existence of France, and eclipsed, in a moment, the gaiety of nations. But, enough. The breath of tradition and the annals of history will transmit the execrable deed, to the indignation of distant ages. The exiled clergy of France have experienced the wonted generosity of the English nation. Their ill-fated destiny and the mis-guided council that occasioned it, sat heavy on the soul of their dying patron; it is our duty, therefore, to continue the sweets of charity, towards objects, whose only crimes are fidelity to their God, loyalty and attachment to their king, and love for their country.

These laws of Treason breathe a spirit of mildness and indulgence to the subject. The learned bishop Burnet observes, that their promulgation seems  
adopted



adopted to give encouragement and security to traitors. Certainly, the requisition of two witnesses to an overt act, is an advantage that must always support the cause of innocence. Since our criminal code has advanced towards perfection, no long and black catalogue of traitors stare us in the face. No star that shines in the political hemisphere, will ever again fall a sacrifice to fictitious treason. Our nobles will not be cut off in the pride of honour and flower of youth, nor our statesmen breathe their last, for serving their country with zeal. No Sydney will stain the page of history—No Russell will drop innocent blood on the scaffold.

One word of the press. The liberty of the press is the *palladium* of the constitution, but its licentiousness is *Pandora's* box, the source of every evil. Faction leaders have in all ages called themselves the People, they point out to the multitude by virtue of this assum-



ed authority, grievances that exist only in imagination, and promise those scenes of happiness which can never be the lot of the many. But these men know full well the remedies they administer; they prescribe a soothing cordial, which produces the agonizing convulsions of poison. These men give the tone to the multitude, and the cry that their High Mightinesses have echoed for the present day, is the *liberty of the press*. But let the votaries of the press remember, that no government, ancient or modern, ever yet enjoyed half such an unbounded freedom of publick discussion as our own, and that unless the press is restrained and new-modelled, this censorial power, as it is called, will soon become the legislative. In the *Athenian* government, the court of *Areopagus*, punished wits and libellers with death. In the *Roman* common-wealth the liberty of writing was curbed by the severest laws. In modern days, the *Spanish* inquisition is not yet forgot. *Venice* watches her press with such jealousy

jealousy and vigilance, that the fundamental maxim of the state is, silence in publick affairs; and in bleeding *France* the people are deprived of expressing even their thoughts. And in our own government as a grateful return for as much unlimited enquiry into political measures as is consistent with the well-fare of the state, the enemies of our country would fain persuade us, that the press is in danger of annihilation, and to be again subject to the restrictive power of a licenser, and learning engrossed as the staple commodity of the kingdom. The words of their adored Milton apply to themselves.

"They baul for *freedom* in their senseless moods,  
And still revolt, when truth would set them free;  
"Licence they mean, when they cry *Liberty*."

All Europe is in arms, and the happiness of millions depends on the event. This is not a war of conquest, ambition, or aggrandizement; not a war of commerce, or for territorial acquisition. But it is singularly  
con-

conspicuous for implicating the question, whether the elements of civil society are to be disorganized, and reduced to a chaos. It is a war undertaken, because the balance of the world trembles on it's beam. Under these circumstances, the British nation awakes at the early call of danger; while visions of immortal glory, and dreams of victorious rapture swim before the warrior's eyes. Like an eagle she mues her mighty youth, and soaring aloft, kindles her undazzled eyes, at the full mid-day beam. Whilst the inferior birds of prey, glutted with rapine, and foul with blood, are scared at the sight, and by discordant and dreadful notes prognosticate their future fall.

Amid this ardor of loyalty, and vigour of preparation, it is the duty of every citizen to associate with good men, for the preservation of domestic peace, and for those concerns which are nearest and dearest our hearts,  
liberty

liberty and life. A late attempt to overturn the constitution has been prevented by a manly and unbiaſſed appeal to the ſentiments of the nation. For this ſignal favor, and for the ſucceſs of our arms and internal tranquillity, let us not forget to aſſail the willing ears of that omnipotent protector, who was the object of *Wolfey's* pathetic lamentations in the laſt moments of expiring grandeur. From the experience of the paſt, we may hope with confidence, that the ſtorms of faction will never ſhiver thoſe beautiful laurels of liberty, which have ſo effectually withſtood the decays of time, and the ravages of prerogative; and that no malignant cloud will force the untimely ſetting of that genial ſun, which ſhines with a mighty luſtre, in the eyes of all the world.

*London, March 4, 1793.*

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## CHAP. I.

*Of High Treason.*

**TREASON**, generally speaking, is the breach of some particular duty, which the inferior is bound to pay to the superior. It is divided into High Treason and Petit Treason.

*High Treason*, is a renunciation of that allegiance, either natural or local, which is due from every man, who lives under the King's protection. It is a crime levelled immediately at the person of the King, or the tranquillity of the kingdom; and is called High Treason on account of the majesty of



## OF HIGH TREASON.

the personage against whom it is committed.

*Petit Treason*, which is a breach of private duty, is the malicious killing of one, to whom obedience is due. As when a servant kills his master, a wife her husband, or an ecclesiastic his prelate.

There are three kinds of High Treason.

- I. High Treason by the common law.
- II. By the statute 25 of *Edward 3*.
- III. By subsequent statutes.

Before we enter into a successive discussion of these, it will be proper to consider, what persons are capable of committing this crime.

Every subject of *Great Britain*, whether ecclesiastical or temporal, man or woman, if of the age of discretion,

and of sane memory, may be guilty of high treason *a*. If a *married* woman commit high treason, in the company of her husband, or by his command, she is punishable as if *unmarried*; for in a crime of such magnitude, the presumption of coercion by the husband, is no excuse *b*. A soldier cannot justify, by the command of his superior officer, for as the command is traitorous, so is the obedience *c*. Neither can a man justify, by acting as counsel *d*. Formerly, madmen were punished as traitors *e*, but now they are not punishable, if the crime is committed, during a total deprivation of reason *f*.

*a* 1 Hawkins's Pleas of the Crown 50.

*b* Id. p. 4. 1 Hale's Pleas of the Crown 47.

*c* Resolved by the judges, in the case of Axtell, a soldier, who commanded the guards, upon the trial and murder of Charles the First. Kelyng. Rep. 13.

*d* Cooke's case, who managed the charge against Charles the First. Kelyng. 23.

*e* 5 Bacon's Abr. 109. 33 Hen. 8. c. 20.

*f* 1 Hale 37. 4 Blac. Com. 24, 25. The case of Lieutenant Frith at the Old Bailey 1790.

If a man by personal force, and present fear of death, be compelled to join rebels or enemies, in acts of rebellion or hostility, it is held an excuse, but the party must shew, that it was an actual force, and that the traitors were left as soon as possible. These points were ruled in *Macgrowther's* case, in the rebellion of 1746 g. And those that supplied Sir *John Oldcastle* and his accomplices, then in rebellion, with provisions, were acquitted. Because it was found to be done, *pro timore mortis, et recesserunt quam citò potuerunt b.*

The husband of a Queen *regnant*, as was King *Philip*, may commit high treason. So may a Queen *consort*, against the king her husband. Such were the cases of Queen *Ann Boleyn*, and *Catharine Howard i*; for they are con-

g 9 Sta. Tri. 567, 568.

b 1 Hale 50. 139. But an apprehension, however well grounded, is no excuse. 8 Sta. Tri. 56. 4 Blac. Com. 30. 83.

i Principles of Penal Law 125.

## OF HIGH TREASON.

sidered in the eye of the law, as distinct persons, for many purposes *k.*

*Aliens* may commit it; for as there Aliens.  
is a local protection on the King's part, so there is a local allegiance on theirs *l.* There is no distinction whether the alien's sovereign is in *amity* or *enmity* with the crown of *England*. If during his residence here, under the protection of the crown, he does that which would constitute treason in a *natural born* subject, he may be dealt with as a *traitor m.* So also if he resides here, after a proclamation of war, between the two sovereigns; unless he openly removes himself, by passing to his own prince, or publicly renounces the king of *England's* protection, which is analagous to a *diffidatio*, or defiance; and then under such circumstances he is considered as an *enemy n.* Thus

*k* 3 Coke's Inst. 8. 5 Bacon's Abr. 109.

*l* 7 Coke's Reports 6. Calvin's Case.

*m* 1 Hale 60.

*n* 1 Hale 92.

## OF HIGH TREASON.

the Marquis *De Guiscard*, a French papist, residing here during a war, under the protection of Queen *Anne*, was charged with holding a traiterous correspondence with *France*. And two *Portuguese*, were indicted and attainted of high treason, for joining in a conspiracy with Dr. *Lopez* to poison Queen *Elizabeth* o.

If an *alien*, during a war with his native country, leaving his family and effects here, goes home, and adheres to the King's enemies, for the *purposes of hostility*, he is a traitor; for he was settled here, and his family and effects, are still under the king's protection *p*. In declarations of war, it has been frequently usual to except, and take under the protection of the crown, such resident aliens, as demean themselves dutifully, and neither assist or correspond

o 7. Coke's Rep. 6. Calvin's Case. Dyer's Rep. 144. Sherley's Case.

p 1 Salkeld 46. 1 Ld. Raymond 282. Foster's Crown Law 185, 186.

with



## OF HIGH TREASON.

with the enemy. In that case they are upon the footing of aliens coming here by licence or safe conduct, and are considered as aliens *am q.*

If an alien *enemy* invades the kingdom in a hostile manner, he cannot be *indicted* for treason, for he owes the King no allegiance, but may be proceeded against by *martial law r.* If an alien is charged with a breach of his *natural* allegiance, he may give *alienage* in evidence, for he is charged with a breach of that species of allegiance, which is not due from an alien *s.*

*Alien merchants* are protected by the statute staple *t.* in case of a war, which provides, that they shall have

*q* By all the judges, January 12, 1707. Foster 185.

*r* 7 Coke's Rep. 6, 7. Perkin Warbeck's Case.

*s* Hale 100.

*t* Cranburn's Case. 4 Sta. Tri. 699, 700.

*u* 27 Ed. 3. Stat. 2. Magna Charta, ch. 30.

## OF HIGH TREASON.

convenient warning, by forty days proclamation, or eighty days in case of accident, to avoid the realm; during which time, they may be dealt with as traitors, for any treasonable act: if after that time they reside and trade here, as before, they may be either treated as alien *enemies*, by the law of nations, or as traitors, by the law of the land *u*.

Embassadors.

It is a question, whether the general exemption of *embassadors* from the cognizance of the municipal tribunal, extends to treason? On the one hand, there is a positive breach of local allegiance, on the other, an infringement of the privilege of personal inviolability, universally allowed by the law of nations *v*. Lord *Coke* maintains "that if an ambassador commits treason, he loses the privilege and dignity of an ambassador, as unworthy

*u* 1 Hale 93, 94.

*v* 2 Burlamaqui's Natural and Politic Law 367.

4 Inst. 153.

" of so high a place, and may be punished *here*, as any other private alien, and not remanded to his sovereign, *but of curtesy w.*" Most writers agree that an ambassador conspiring the death of the King, or raising a rebellion, may be punished with death. But it is doubted, whether he is obnoxious to punishment for *bare conspiracies of this nature* x.

The *Bishop of Ross*, ambassador from Mary Queen of Scots, to *Elizabeth*, was committed to the tower, as a confederate with the Duke of Norfolk, for corresponding with the Spanish ministry, to invade the kingdom; he pleaded his privilege, and afterwards, having made a full confession, no criminal process was commenced y. The Spanish ambassador for encouraging

w Id. 153.

x 1 Roll's Rep. 185. 1 Hale 96, 97. 99.

y Id. 97. 1 Sta. Tri. 105. Cardinal Pole's person was held sacred, when Henry the Eighth demanded him of the Pope. 4 Inst. 153.

treason,

treason, and the French ambassador for conspiring the same queen's death were only reprimanded. Doctor *Story* was condemned and executed, but he was an *Englishman* by birth, and therefore could never shake off his natural allegiance z.

\* From this view we may collect, that the *right* of proceeding against ambassadors for treason, in the ordinary course of justice, has been *waved* from motives of policy and prudence; and that they have seldom been proceeded against further than by imprisonment, seizing their papers, and sending them home in custody. As was done in the case of Count *Gyllenberg* the Swedish minister in George the Second's time a.

A *natural born* subject cannot abjure his allegiance, and *transfer it to a foreign prince*. Neither can any foreign prince, by naturalizing, or employing a sub-

z Dyer 298. 300. 3 Sta. Tri. 775.

a Foster 187. 1 Blac. Com. 254.



ject of *Great Britain*, dissolve the bond of allegiance, between that subject and the crown *b*. This was determined, in the case of *Æneas Macdonald*, who was born in *Great Britain*, but educated from his early infancy in *France*; and being appointed commissary of the French troops intended for *Scotland*, was taken prisoner, tried, and found guilty of high treason *c*.

I. Treason by the common law was indefinite. General principles were laid down, to which every case was applicable, whether it was against the King or the government, according to the liberal interpretation of the times. The judges being defenceless and dependent, were compelled to court the favour of the sovereign, by adopting a rule of conduct in their decisions, at once arbitrary and unlimited. These constructive treasons varied in different reigns, according to the security of

Treason  
by the  
Common  
Law.

*b* 1 Blac. Com. 369.

*c* Foster 60. 9 Sta. Tri. 585.

the



the monarch's crown, the turbulence of his barons, or the power of his opponents. But at all times the smallest breach of allegiance, a term of no positive meaning, was punished as treason.

Exercising, or as it was called *accroaching royal power, and subverting the realm*, seem to have been the general charges. But what was accroaching and subverting, or what defence to make, no man could tell *d*. In the reign of Edward the First appealing to the *French* courts, in opposition to the king's, was in parliament solemnly adjudged high treason, in the case of *Nicholas Segrave e*. In the reign of Edward the Second, the *Spencers* were accused of accroaching royal power *f*. This was one, though an inferior charge against *Roger Mortimer*, in the following reign. Sir *John Matravers*

*d* 1 Hale 79, 80.

*e* 3 Inst. 7. 1 Hale 79.

*f* Id. 80. 2 Sta. Tri. 305.

was attainted of treason for killing the king's uncle *g*. A knight was indicted for treason, for assaulting and robbing another on the highway; he was not convicted, but judgment was given, against his companions *b*. Piracy by one subject upon another, and killing the king's father, brother, or even a messenger, fell under the same determination; and it was admitted that an appeal of treason lay, for the killing one, with malice prepense, who was sent to assist the king in his wars *i*.

This great latitude allowed by the common law, of enhancing offences into the crime and punishment of treason, had been abused by the courts, in these and many other arbitrary decisions, and had for a long time terrified and harassed the kingdom. The will of the judge was law, and frequently even the shadow of a legal trial, was denied. At

*g* 1 Hale 82. 3 Inst. 7.

*b* 1 Hale 8c. 4 Blac. Com. 76.

*i* 1 Hawkins 49. 3 Inst. 8.

length

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length was enacted, after frequent complaints and petitions from the commons, the popular statute of the 25 of *Edward the Third*; a statute so mild and merciful, and from a sad remembrance of past decisions, so propitious to the subject, that it was received by the nation with affection and gratitude. This statute is indeed momentous, it defines the limits of treason with jealous circumspection, forbidding a trial, without a crime, and a condemnation, without a legal verdict.

Treason  
by the  
25 Ed. 3.

II. The treasons declared by the 25 *Ed. 3. stat. 5. c. 2.* are, “when a man  
“doth compass or imagine the death of  
“our lord the king, or of our lady the  
“queen, or of their eldest son and heir;  
“or if a man do violate the king’s com-  
“panion, or the king’s eldest daughter  
“unmarried, or the wife of the king’s  
“eldest son and heir; or if a man do  
“levy war against our lord the king in  
“his realm, or be adherent to the king’s  
“enemies in the realm, giving them  
“aid

"aid and comfort, in the realm or else-  
"where, *and thereof be provably at-*  
"tainted of open deed, by the people  
"of their condition. And if a man  
"counterfeit the king's great or privy  
"seal, or his money; and if a man  
"bring false money into this realm,  
"counterfeit to the money of *England*,  
"knowing the money to be false, to  
"merchandize or make payment, in  
"deceit of the king and his people.  
"And if a man flea the chancellor,  
"treasurer, or the king's justices of the  
"one bench or the other, justices in  
"eyre, or justices of assise, and all other  
"justices assigned to hear and determine,  
"being in their places, doing their  
"offices."

From a review of this statute, it will appear, that the treasons relate either to the king's person, or family, to his seals, to his coins, or to his office in the administration of justice.

Counter-

Counterfeiting the king's seals, or coins, being rather a branch of the *crimen falsi*, or forgery, than a species of the *crimen læsæ majestatis*, or high treason, will not be the subject of discussion. Neither will that part of the statute be treated of, which is calculated to preserve the royal issue, from bastardy. The remaining species are four.

1. Compassing, or imagining the king's death.
2. Levying war against the king.
3. Adhering to the king's enemies.
4. Killing the chancellor, or other officers of justice.

1. "When a man doth compass or  
"imagine the death of our lord the  
"king, or of our lady the queen, or of  
"their eldest son and heir."

Who is a  
king  
within  
the act.

The king must be in actual possession of the crown. A prince, succeeding to the crown by descent, or by a *previous designation of parliament*, is from the moment



ment his title accrues, a king within the act: a coronation being only a notification of the *descent* of the crown; all it's prerogatives being legally vested, in the person of the king, antecedent to that solemnity *k*. A king *de facto*, only, is the object of treason *l*; a king *de jure*, one who has a right or title to the crown, without possession, has no claim to allegiance, for it has been well observed that protection and allegiance are reciprocal terms *m*. Henry the Fourth, was an usurper, but being in possession of the sovereignty, was protected by the act. Sir Matthew Hale thinks, an act of hostility, against the possessor of the crown, *in favor of the rightful heir*, not to be treason *n*; Sir Edward Coke says, that if treason is committed against a king *de facto* only, the king *de jure*, afterwards coming to the throne, may punish the treason done to the king *de facto* *o*.

*k* 3 Inst. 7.

*l* 1 Hale 101, 102, 103.

*m* 1 Hawkins 52. 4 Blac. Com. 77.

*n* 1 Hale 61. 103.

*o* 3 Inst. 7.

C

And

And Sir Ralph Gray was punished in the reign of Edward the Fourth, for treason committed against Henry the Sixth. The 11th of Henry the Seventh, chap. 1. enacts "that from thenceforth no person "that attends on the king, *for the time being*, and does him true and faithful allegiance, shall be convicted or attainted of treason *p.*" After the restoration of Charles the Second, those who kept him out of possession, were guilty of treason *q.* But the judges had resolved that Charles was king *de facto*, as well as *de jure*, from his father's death, and that no other person, known to our laws, was in possession of any sovereign power. For the long parliament was *determined* by the death of Charles the First, notwithstanding the act, that it should not be dissolved, but by consent of the two houses; and

*p* See Sir William Blackstone's interpretation of this statute. 4 Com. 77, 78.

*q* Kelyng's Reports 15. Sir Henry Vane's case.

no legal authority, but the king's, could call another *r.*

If a king voluntarily resigns, or is deemed by parliament to have abdicated, or by actions subversive of the constitution, virtually to have renounced the government, he is no longer protected by the statute. The resignation of Richard the Second, was extorted by force, and therefore does not apply; but James the Second renounced holding the crown, upon the terms of the constitution, and actually vacated the throne; consequently, he was no longer king *s.*

Let us now consider, what is a *compassing* or *imagining* the death of the king. These words are of synonymous and

Compassing the death of the king.

*r* Kelyng. 14, 15.    *i* Keble's Rep. 316.  
*i* Hawkins 53. The distinction between a king *de jure*, and *de facto*, is a distinction without a difference, being equally serviceable to all sides, and parties. So it was, in regard to Henry VI. and Edward IV. who were alternately, declared by parliament, rightful kings and usurpers.

*s* 4 Blac. Com. 78.

C 2

general

general import; they relate to the purpose and design of the mind, therefore, there must be both a traiterous will, and a traiterous act. The accidental killing of the king, without *intention* of doing him harm, is not a compassing. As when Sir *Walter Tyrrel*, by command of William Rufus, shot at a deer; the arrow glanced from a tree, and killed the king *t*.

The wicked imaginations of the heart are considered in the same degree of guilt, as if carried into actual execution, but the guilt commences, the moment *measures* appear to have been taken, to render them *effectual* *u*, and the statute has been so strictly followed, that where a king has been actually murdered; not the killing, but the compassing has been laid as the treason, and the killing as an overt act *v*.

*t* 3 Inst. 6. 1 Hale 137.

*u* Prin. Pen. Law 121.

*v* Trials of the 29 Regicides, at the Old Bailey, 1660. 2 Sta. Tri. 303.

The

The statute requires that the traitorous imagination be demonstrated by some open or *overt* act. Providing weapons, ammunition, or poison, for the purpose of carrying into execution, a conspiracy against the life of the king, is an overt act *w*. Dr. *Lopez*, physician to queen Elizabeth was executed for conspiring her death; the overt act, was procuring poison for that purpose.

*Overt acts  
of com-  
passing.*

If conspirators meet and consult *how* to kill the king, though no scheme is then adopted, this is an overt act. And every person who assents to overtures for that purpose, or by advice, persuasion, or command encourages others to commit the fact, is involved in the same guilt *x*. Upon the trial of *Charnock*, for an attempt to assassinate William the Third, by over-powering the guards, and firing into his coach; his being present at a meeting, where the time, the place, and the manner, were fixed upon, was

*w* 1 Hale 109. 3 Sta. Tri. 8, 18.

*x* 5 Bac. Abr. 112. Kelyng. 17. Foster 195.



held to be an overt act *y*. This was ruled also, in the case of *Tongue*, and other confederates, for a conspiracy to kill Charles the Second *z*. If a man is once present at such a consultation, *previously knowing the design of the meeting*, this is evidence of his approbation. As also, if a man is *twice* present at such a consultation, and neither disapproves of, or reveals the conspiracy. Sir Everard Digby had judgment of high treason, for being privy to, and not revealing the Powder plot, though it was not proved, that he either said, or did any thing, at the consultation *a*.

Upon the trial of Dr. *Hugh Peters*, contriving and proposing the death of the king, and encouraging others to commit the fact, by discourse, and exhortations from the pulpit, were held overt acts *b*.

But

*y* 4 Sta. Tri. 561.

*z* 2 Sta. Tri. 478.

*a* Kelyng. 17.

*b* This trumpeter of sedition upon a solemn day appointed to seek the Lord, said, that the citizens for  
a little

But the statute is not solely confined to personal plots or assassinations; every wilful and deliberate attempt, that may immediately, or consequentially endanger the life of the sovereign, is within its scope. Therefore a conspiracy forcibly to imprison, till certain demands are complied with, or to depose the king, is a compassing. As was adjudged, in the case of the Earls of *Effex* and *Southampton* *c*, these mis-guided noblemen conspired to seize the Tower, overpower the guards, and surprize the court, with a view to compel queen Elizabeth to call a parliament, and settle a new plan of government *d*. Upon the trial, the lord steward recommended *Effex* to reveal the plot and solicit a pardon. *Southampton* escaped with impri-

a little trading would crucify *Christ*, (pointing to the red coats on the pulpit stairs) and release *Barabbas*. And compared the high court of justice, to judging the world, at the last day, by the saints. 2 Sta. Tri. 361. 363. 366, 367.

*c* 3 Inst. 12. Kelyng. 21. by all the judges. 1 Hawkins 51. 1 Sta. Tri. 198.

*d* Camden's Elizabeth 630.

sonment during Elizabeth's life; and the sceptre of mercy would have been extended to the unfortunate *Essex*, but all his prospects were closed for ever, by the fatal treachery of the remorseless Lady Nottingham *e*.

Upon this trial the judges gave their opinion upon two points. First, that if a subject attempts to put himself into such strength, that the king is unable to resist him, and to compel him to govern otherwise than by his royal authority, it is manifest rebellion. Secondly, that in every rebellion, the law intends as a consequent, the compassing the death, and deprivation of the king; foreseeing, that the rebel will never suffer that king to live, or reign, who would punish him for his treason and rebellion *f*.

Levying  
war, &c.

Levying war, or an overt act of such intention, or of bringing war upon the

*e* 5 Hume's Hist. of England 446.

*f* 1 Sta. Tri. 207.

king-

kingdom, is an overt act of compassing g. So is *meeting and consulting* to levy war. But since a consultation to levy, is not an *actual* levying, it cannot be brought under that species, where *levying war itself* is treason b. The overt acts laid in Lord *Russel's* indictment were a conspiracy to levy war, and to seize and destroy the king's guards. As to the first, stirring up insurrection and rebellion is constructively only against the king, and could not be a sufficient overt act, to justify an imagination of compassing the king's death. As to the second, it was proved that Lord *Russel* only was present, during a discourse about viewing the posture of the guards; and no actual view was taken. In the opinion of the ablest lawyers, he was illegally convicted i, the evi-

g 1 Burrow's Rep. 646. 6 Sta. Tri. 328.  
Laver's case.

b Kelyng. 20. 1 Hawkins 55.

i 3 Sta. Tri. 721, 722. See a defence of Lord *Russel's* innocence. Id. 755. 757.

dence

dence being insufficient and contradictory.

Corresponding with Foreigners to invade the kingdom.

Whatever has a remote tendency, to affect the personal security of the king, is within the statute; therefore entering into measures, in concert with Foreign powers, to invade the kingdom, is a sufficient overt act. During a war with France in 1690, Lord *Preston* was seized in a vessel at Gravesend, and some papers were found upon him, containing a plan of invasion, in favor of James the Second, and an account of the strength of several *English* forts and garrisons. Lord *Preston* insisted that no overt act was proved, though laid, in *Middlesex*. But, the court held, that taking boat at Surry Stairs, with an intention of going to *France*, and of carrying the papers there, for the *purposes charged in the indictment* was a sufficient overt act in *Middlesex* *k.* The overt act in the Duke of *Norfolk's*

*k* 4 Sta. Tri. 410. 447. Lord *Preston's* indictment was for compassing the king's death, and adhering to his enemies.

case,



case, was his intended marriage with Mary queen of Scots, and his correspondence with the Duke of Alva, to raise an army, to invade the kingdom. Mary had formerly laid claim to the crown, it was therefore argued, that whoever married her would support her title, and consequently endeavour to depose queen Elizabeth. The letters had no signatures, and were only proved to be the Duke's by reading the confession of an agent, who vouched for their authenticity. This conviction was contrary to all law and justice, being proved to be treason, only by presumptions and inferences *l*. Sir Walter Raleigh was indicted for corresponding with Spain, to advance Lady Arabella Stuart to the throne, and to depose the king. The only proof against him was Lord Cob-

*l* 1 Hale 120. 1 Sta. Tri. 85. 103. Mary's attachment to the Duke infused into Elizabeth's breast, terror and jealousy; she therefore proceeded against the Duke with the most unrelenting severity. See Sir Edward Coke's opinion of the 25 Ed. 3. 3 Inst. 12.

ham,

ham, whose evidence was suffered to be read, without confronting the witness to the prisoner *m*.

Inciting a foreign invasion, may seem more properly to belong to another species of treason, that of levying war. But, unless the powers incited are actually at war with this country, it will not fall within any branch of the statute, except compassing the king's death. Since then it certainly tends to endanger his person, it has in strict conformity to the statute, been brought within the species of compassing *n*. So it was ruled in the case of *Harding*, who raised and sent men to France, during a war, for

*m* 1 Sta. Tri. 213. 216. 220. 226. Raleigh was condemned, but the sword of justice was suspended over his head. He was confined in the Tower, fourteen years; afterwards having a commission to Spain, he was unsuccessful, and committed some outrages: when James the First, to oblige the king of Spain, who made a point of it, put the cruel sentence in execution.

*n* Foster 197.

the

the purpose of restoring James the Second *o*.

In the rebellion of Jack Cade, who collected an armed force, and marched to London, for the redress of grievances, it was declared, by the 29 Hen. 6. c. 1. which attainted him of rebellion, that gathering men together, and exciting them to rise against the king, was an overt act of imagining his death *p*.

Formerly treasonable *words spoken*, Words, amounted to an overt act, and two cases are cited in the reign of Edward the Fourth; one of a man living at the sign of the Crown, who told his child, he would make him *beir of the crown q*. The other of Thomas Burdet, who wished the horns of a favourite buck, in the belly of him who advised the king to

*o* 2 Ventris's Rep. 316.

*p* Id. 317.

*q* 1 Hale 115. 4 Blac. Com. 80.

kill

kill it *r*. But these were arbitrary cases; and because words admit of such an endless variety of constructions, it has been determined that mere loose words not relating to any treasonable purpose in agitation, are not an overt act *s*. It was resolved in *Pyne's* case "That no words were treason, unless by some particular statute *t*. And Sir Edward Coke says, words may make a man an heretick, but not a traitor, without an overt act *u*."

Thus much of loose words in general; but words may *expound* an overt act, in itself *indifferent*, but when coupled with the words, they may be an exposition of compassing. As were these words, in *Crookagan's* case, "I will kill the king, if I may come unto him;" it being proved

*r* Id. *ibid*. Cro. Car. 120, 121.

*s* 1 Hale 114. 323. 1 Hawkins 57. Foster 200. 1 Blac. Rep. 37.

*t* Cro. Car. 125. for the words in *Pyne's* case see p. 117.

*u* 3 Instit 14. 4 Sta. Tri. 593.

he came into England, for that purpose *v.* Also these words "the king" "being excommunicated by the Pope," "may be lawfully deposed and killed," "by any whatsoever, which killing is" "not murder *w.*" "If the king" "should arrest me of high treason I" "would stab him." "If King Henry" "the Eighth will not take back his" "wife, he shall not be king, but shall" "die *x.*" Also words which manifestly shew a design to kill the king, make an overt act, though the design be future and conditional.

But words *written and published*, either in letters, or books, will make an overt act, if the matter contained, *imports a compassing y.* As was Twyn's case for publishing "a treatise on the

*v* Cro. Car. 332. Kelyng. 13.

*w* 1 Hale 117. 1 Hawkins 57.

*x* 5 Bac. Abr. 114. 3 Mod. Rep. 52, 53.

Rosewell's Case.

*y* 3 Inst. 14. Hale 118.



execution of justice" asserting, that the supreme magistrate, was accountable to the people, and that they might take arms, to put the king to death *z*. Also in the case of *Williams* for inclosing and sending, in a box, to Charles the First, a book, declaring that the king should die in the year 1621, and that the kingdom should be destroyed *a*. Publishing a book, or sending a letter, in citing a foreign invasion, is an overt act; for the death of the king would probably be the consequence *b*.

Even writings *unpublished*, have sometimes convicted their authors of treason. Such was *Peacham's* case in whose study was found a manuscript sermon,

*z* 2 Sta. Tri. 527. 536. Id. 8. 386. Kelyng. 22, 23.

*a* 2 Roll's Rep. 88. Cro. Car. 125. In this case was first broached, that famous doctrine, *scribere est agere*.

*b* 3 Inst. 14. Cardinal Pole's Case, 5 Bac. Abr. 113. See several cases, for words written and spoken in Croke Charles, from p. 117. to p. 125.

which

which had never been preached or published; he was not executed, for Sir George Croke tells us "many of the judges were of opinion, it was not high treason *c.*" *Algernon Sidney's* case was much harder. He was one of the conspirators, engaged with Lord Ruffel, in the Rye-House plot, to assassinate Charles the Second; only one witness, Lord Howard, deposed against him, and the law required two; his closet was searched, and a discourse, evidently written many years before, in which it was maintained that kings were accountable to the people for their conduct, was deemed equivalent to a second witness. To this stratagem he fell a sacrifice, but it was to the general discontent of the nation, and to the eternal disgrace of the sovereign *d.*

2. "If

*c* Cro. Car. 125. upon this trial, 1 Hale 118. See the unconstitutional interference of the king, and the prostituted submission of the judges. Foster 199. 200.

*d* 3 Sta. Tri. 794. 807. 815. However criminal Sidney's intentions against the king, might have  
D been;

Levying  
war:

2. "If a man do levy war against  
"our lord the king in his realm."  
There must be an actual levying proved  
by an overt act *e.* A conspiracy or  
consultation to levy war, or to provide  
weapons for that purpose, is not a levy-  
ing within the statute. But if the ri-  
sing be effected, both conspirators and  
actors are guilty of high treason *f.*  
The actual assembling of numbers, to  
do an unlawful act, is not a levying,  
if the insurgents are not arrayed in a  
warlike manner *g.*

The levying must be *against the king*,  
which is direct, against his person, or

been; he was illegally convicted. His idol was a  
commonwealth; and though his writings were, per-  
haps, too repugnant to *monarchical* principles; yet  
"a man may be allowed to keep *poisons*, in his *closet*,  
"but not publickly to vend them, as cordials." For  
remarks on Sidney's trial, see 4 Sta. Tri. 196. This  
was the first indictment for high treason, upon which  
any man lost his life for writings *unpublished*. Id.  
197. 1 Siderfin 419.

*e* 5 Sta. Tri. 37. 1 Hale 148. 3 Inst. 10.

*f* 1 Hale 131. 133. 3 Inst. 9. Foster 213,

*g* 1 Hale 131. This is doubted of by Foster 208.

con-

constructive, against his government. It extends not only to those, who take up arms, with intent to dethrone the king, but to those, who forcibly endeavour to reform the religion, or laws, or to redress national grievances, this being a defiance of government, and an attack upon the authority of the king *b*. In *Bradshaw* and *Burton's* case, a conspiracy in Oxfordshire, to rise and procure arms, in order to throw down inclosures, and to enlarge highways and lands was held treason. But they were indicted upon the 13 Eliz. c. 1. which makes a conspiracy, to levy war, treason *i*.

Insurrections to throw down *all* inclosures, to enhance the price of *all* labour, or to open *all* prisons, is a levying, because of the universality of the

*b* 1 Hawkins 54. Prin. Pen. Law 130, 131.  
8 Sta. Tri. 289.

*i* 3 Inst. 10. 1 Hale 132. Popham's Rep. 122.

design, being an open forcible attack upon government *i*. An insurrection for the expulsion of foreigners in general, or for the redress of real or imaginary evils, of a publick nature, in which the insurgents have no special interest, is a constructive levying *k*. So also is aiding and assisting rebels, or attending the leaders, from the beginning, even without being privy, to the design of rising *l*. An insurrection to raise the price of servants' wages, is a levying, because being done in defiance of the statute of labourers, it is done in defiance of the king's authority *m*.

At a trial at the Old Bailey, 20 Car. 2. Pulling down bawdy-houses, breaking open prisons, and letting prisoners loose,

*i* Foster 211. 1 Hawkins 54. 4 Blac. Com. 82.

*k* Foster 211.

*l* 1 Hawkins 55.

*m* 5 Bac. Abr. 117. 3 Inst. 10.



was held a levying of war *n.* The cases of *Damarree and Purchase*, for destroying the meeting-houses of the Protestant dissenters, were ruled by the principle, of the universality of the design of the conspirators; it was proved, there was a general cry of *down with the meeting-houses*; that one was destroyed in Lincoln's-Inn Fields, and it was then agreed to proceed to demolish the *rest* of the meeting-houses. The Court was of opinion it was high treason. Here was a rising avowedly to demolish, *all* meeting-houses in general. Had the meeting-houses been illegal, it would have been treason, according to the case of demolishing all bawdy-houses; but the meeting-houses were protected by the Toleration act, therefore the insurrection in the present case, was an attempt, to render that act in-

*n* Kelyng. 70. 74, 75. 1 Siderfin 358.  
 1 Ventris 251. A special verdict was returned.  
 All the judges met, and were of this opinion except Sir Matthew Hale.

effectual, by numbers and force *q.* So, an attempt by force and intimidation, to compel the repeal of a law, was laid down by the whole Court of King's Bench, to be levying war against the king, in the case of *Lord George Gordon*, for assembling a multitude of people, who by his encouragement, committed many acts of violence, and burnt several Roman Catholick chapels *p.*

An insurrection, the ground of which is a *private* quarrel, is not treason, though acts of violence ensue. As when two great barons, with an armed force attacked and ravaged each other's persons and lands *q.* A rising to remove a *private* particular grievance, as

*o* 8 Sta. Tri. 222. 247. 289. Foster 214, 215.

*p* 2 Doug. 590. The act was 18 G. 3. c. 60. [ for relieving Papists from certain penalties and disabilities.

*q* The case of the Earls of Gloucester and Hereford 20 Ed. 1. 1 Hale 141 in notis and 149. 4 Blac. Com. 82.

to pull down an enclosure, intrenching upon a right of common, is not treason, but a great riot *r*. Neither was a rising of men of the same trade, unarrayed in a warlike manner, to redress a private grievance. As was the case of the weavers in London, who tumultuously assembled to destroy the engine looms, and committed great outrages *s*.

Holding a fort or castle against the king's forces; or detaining them; or delivering them up, by treachery, or combination, to rebels, is levying war. So is attacking the king's forces, upon a march, or in quarters, in opposition to his authority *t*.

*r* 3 Inst. 9. Kelyng. 75.

*s* 1 Hale 143, 144, 145. Foster 210. Upon a consultation of the judges, five were of opinion, this case was within the statute, the other five were of a contrary opinion. But the Attorney General proceeded against them for a riot only.

*t* Broke's Treason, p. 24. Foster 219.

OF HIGH TREASON.

And in *Bensted's* case, 16 Car. 1. going in a tumultuous and warlike manner, to surprize at Lambeth, the Archbishop of Canterbury, a privy councillor, was adjudged treason *u*.

Lastly, the place must be *in his realm*, the narrow seas are part of the dominions of the crown of England, therefore if any subject hostilely invades the king's ships upon those seas, it is levying war within the realm *v*.

Adhering  
to ene-  
mies.

3. "If a man be adherent to the king's enemies in his realm, giving them aid or comfort, in the realm, or elsewhere." By enemies are meant, *aliens* in notorious hostility; for rebellious subjects, are traitors. The solemnity of a previous denunciation of war, is not always necessary, as in the instance of general letters of marque and reprisal; and is sometimes impossi-

*u* Cro. Car. 583. W. Jones's Rep. 455. S. C.  
*v* 1 Hale 154. 170. Co. Lit. 260.

ble *w*, as in the emergency of a sudden invasion. Thus the Scots who invaded the kingdom, in the reign of Elizabeth, were held to be the queen's enemies, though at that time, there was no war between England and Scotland *x*.

There must be an actual adherence; a conspiracy to aid or comfort the king's enemies, is not within the act; but if the assistance is afterwards actually given, it is *y*. If pirates or robbers, subjects of a foreign state, in amity with us, invade our coasts, giving them assistance, is adhering to the king's enemies *z*. But to relieve a rebel fled out of the kingdom, is not an adherence, for the statute is taken strictly, and a rebel is not an enemy *a*. Detaining or delivering up a fort or

*w* Princ. Pen. Law 136. 1 Hale 163.

*x* Duke of Norfolk's Case. 3 Inst. 11.

*y* 3 Inst. 9. 5 Bac. Abr. 118.

*z* 4 Blac. Com. 83.

*a* 1 Hawkins 55. 4 Blac. Com. 83.

castle,



castle, to enemies, is an act of adherence *b*.

If there is a war between England and France, Englishmen living in France before, and continuing there after the war, are not solely on that account adherents to the king's enemies, unless they assist in the war. But a refusal to return upon a mandatory writ under the king's seals *c*, or upon proclamation and notice in England, is evidence of adherence *d*.

If a subject of a foreign state, living in England under the king's protection, and continuing so after proclamation of war, secretly assists the state at war, either before he leaves the kingdom, or openly renounces his allegiance, he is an adherent within the act *e*. Procuring a man to be enlisted, and

*b* Foster 219,

*c* 1 Blac. Com. 266.

*d* 1 Hale 165.

*e* Dyer 144. 1 Hale 165.

fending

sending him into the service of a state at war with us, is an overt act of adherence; so also if a man inlists himself *f*. And upon the trial of Captain *Vaughan*, accepting a commission from France, at enmity with us, and cruising in order to attack and take the king's ships, was of itself, without any other act of hostility, held an adherence *g*.

If a subject of England makes actual war on the king's allies, engaged against a common enemy, which has been frequently the case of the States-General, in our wars against France, this is an adherence, though no act of hostility is committed against the king or his forces; for the king's enemies are thereby encouraged and strengthened *b*. If the states are in alliance, and the French at war with us, those Dutch,

*f* 2 Salk. 635.

*g* 5 Sta. Tri. 37. 2 Salk. 634. S. C.

*b* So held by Lord Holt in *Vaughan's Case*,  
5 Sta. Tri. 36. Foster 220.

men who accept a French commission, are the king's enemies; for their subjection to France, makes them *French* subjects, as to all other nations but their own; and if a subject of England assists them, cruising at sea, he is not a pirate, but a traitor *i*.

Furnishing rebels or enemies with money, arms, ammunition, or other necessaries, or sending intelligence of the destination of our enterprizes, or armaments is treason. This was the case of *De la Motte*, who corresponded with the French ministry, and sent information of the force, destination and signals of the fleet *k*. The bare sending is sufficient, though the necessaries sent, or correspondence are intercepted, for the treason is compleat on the traitor's part. As was the case of *Greg*, a clerk in secretary Harley's office, for sending intelligence to one of the prime

*i* 2 Salk 655.

*k* At the Old Bailey 1781.

ministers of France, of the proceedings of both houses of parliament, in relation to the augmentation of our forces; the letters were stopped at the post office, but the judges resolved, that writing and sending letters to the post office, in order to be delivered to the enemy, was an overt act both of adhering and compassing *l.* The same was determined in Dr. *Hensley's* case, where a letter was intercepted, betraying the secrets of government, and advising and soliciting the enemy to invade the kingdom *m.*

4. "If a man slay the chancellor, Killing  
"treasurer, or the king's justices of the the chan-  
"one bench or the other, justices in cellor,  
"eyre, or justices of assize, and all &c.  
"other justices assigned to hear and  
"determine, being in their places, do-  
"ing their offices." These high of-

*l* At the Old Bailey 1707. 10 Sta. Tri. Appendix 77, 78.

*m* 1 Bur: Rep. 649, 650. Trin. 31 G. 2.

ficers

ficers are protected by the act, on account of their superior station, being the personal representatives of the sovereign in his courts of justice. The statute extends only to actual killing. Striking or wounding one of these officers, though in the execution of his office, is not treason. Neither is a conspiracy to kill, but if one of the conspirators actually do it, all the abettors, and counsellors are involved in the same guilt *n*.

No other great officers, but those expressly named, are protected, by the act; therefore, the barons of the exchequer, as such, or the chancellor of the exchequer, are not included. A justice of peace, is not a justice of oyer and terminer, unless he sits by virtue of that commission. The lord keeper, if there is a lord chancellor, is not within the act; but otherwise, if there is no lord chancellor *o*.

Lastly,

*n* 1 Hale 230. 4 Blac. Com. 84.

*o* 1 Hale 231. 1 Hawkins 61. 5 Bac. Abr. 126.

y 7 An. c. 21. s. 8. to kill any of the lords of session,



Lastly, they must be in their *places*, *doing their offices*. Wherever the seal is open, in the court of chancery, or in the chancellor's house, there the chancellor is administering justice. The places for the justices, are the several courts where they usually, or by adjournment, sit for dispatch of business. The lord treasurer's place is the court of exchequer, or exchequer chamber. But it is doubted, whether he is sitting in his place, when doing business in his own house *p*.

III. By a provisory clause in the 25 *Ed. 3*. "because many other like cases of treason may happen, in time to come, which cannot be thought of, or declared at present, it is accorded, that if any other case supposed to be

Treasons  
by sub-  
sequent  
statutes.

sion, or judiciary of Scotland, in the exercise of their office, is high treason. The commissioners, for the custody of the great seal, or of the treasury, are protected by 5 *Eliz. c. 18.* and 1 *W. & M. sess. 1. c. 21.*

*p* 1 *Hale* 232.

" treason,

“treason, happens before any justices,  
 “the justices shall not go to judgment  
 “of the treason, till the king and par-  
 “liament have declared, whether it be  
 “treason or felony.” This clause is a  
 great security to the subject, a direction  
 to the judge, and a safe-guard even to  
 this sacred act itself. Sir Matthew  
 Hale admires the wisdom and care of  
 parliament, in thus keeping judges with-  
 in the express limits of the act, and not  
 suffering them to run out, upon their  
 own opinions, into constructive treasons,  
 even in cases, seemingly analagous, but  
 to reserve them for the decision of parlia-  
 ment. This too is a weighty *memento* to  
 the judges, to be careful and not over-  
 hasty in letting in treasons, by con-  
 struction or interpretation, that are not  
 within the letter of the law: at least in  
 such new cases, as have not been resolv-  
 ed and settled, by more than one pre-  
 cedent *q*. The authoritative decision of  
 these *casus omitti*, is reserved to the king

*q* 1 Hale 259. 4 Blac. Com. 85.

and

and parliament, and the most regular way of doing it, is by a new declarative act. And though some particular cases have been declared by the house of lords alone, though decisions of great weight, they are not determined according to that solemn declaration referred to by the act, as the only criterion for judging of future treasons *r*.

This declarative and interpretative power, thus transferred from the judges to the parliament, was reposed in hands, equally willing and able to determine, without law or precedent. During the ill-fated reign of Richard the Second, the legislature declared many new and extravagant treasons, with thoughtless profusion. In the great appeal in parliament by the duke of Gloucester, against the archbishop of York, exercising supposed acts of royalty, causing improper laws to be enacted, and impoverishing

*r* The case of the earl of Northumberland 5 Hen. 4. and Talbot 17 Ric. 2.

the revenue, were declared high treason. Killing an embassador, and the bare intent of killing or deposing the king, without the demonstration of any overt act, were amongst the arbitrary decisions of this reign, which can be justified only on the principle of necessity; the desperate disease of the state, requiring a desperate remedy *s.*

Henry the Fourth saw the mischief of these overstrained proceedings, and with a view to court popularity, passed an act *t.*, that since "no man knew" how to behave himself to do, speak, or "say, for doubt of the pains of treason, in future, no treason should be judged, otherwise than by the 25 *Ed.* 3." This act at once swept away the whole load of unwarrantable treasons, introduced in the preceding reign, and was faithfully observed by Henry. It is remarkable that when Tresilian and other judges were attainted in this parliament, for

*s.* 1 Hale 263. 266.

*t.* 1 Hen. 4. c. 10.

deliver-



delivering these strange and extrajudicial opinions, they answered, that they durst not do otherwise, for fear of death *u*.

In the reign of Henry the Fifth, and Henry the Sixth, manslaughter, robbery, breaking truces, and the abetting such acts, were declared to be treason against the king's crown and dignity. And John *Mortimer* had judgment pronounced, for escaping from prison, being committed for suspicion of treason against Henry the Fifth *v*.

In the reign of Henry the Sixth, Edward the Fourth, and Richard the Third, many acts of attainder appear, of particular persons, who adhered to either party contending for the crown; according to the success of each.

To detail the various personal and domestic treasons, invented by the pli-

*u* 3 Inst. 22, 23.

*v* 1 Hale 267, 268.



able parliaments of the tyrant Henry the Eighth, would be painful and uninteresting. That amazing heap of wild and new-fangled treasons, was totally abrogated by the 1 Mar. c. 1., which once more reduced all treasons to the standard of the 25 Ed. 3. *w.*

From that, to the present time, many new treasons have been created by parliament, particularly in regard to Papists; maintaining the power of the Pope; and falsifying the coin. There is one statute however, 2 & 3 Ann. c. 20. which makes any officer or foldier guilty of high treason, who corresponds with the queen's enemies, or gives them advice or intelligence, or enters into any treaty or condition, without proper authority. As to the other treasons it will be sufficient to notice those only, which are created for the security of the Protestant succession, in the house of Hanover. By

*w* 4 Blac. Com. 86, 87.

the

the 17 G. 2. c. 39. Adhering to or corresponding with the Pretender or his sons; or by the 1 Ann. stat. 2. c. 17. maliciously endeavouring to hinder the person next in succession, according to the limitations of the act of settlement, from succeeding to the crown; and by the 6 An. c. 7. maintaining that any person has a right or title to the crown, otherwise than according to the act of settlement; or that the kings of this realm with the authority of parliament, are not able to make statutes to bind the crown, and the descent thereof; these offences are declared high treason. This last was the statute upon which *Matthews* was convicted, for printing a treasonable pamphlet, maintaining that the Pretender had an hereditary right to the crown of Great Britain *x*.

The punishment of high treason is terrible and complicated; the crime be- Punish-  
ment of  
treason.

*x* At the Old Bailey 1719. 9 Sta. Tri. 683, 684.

ing immediately levelled at legislators and legislation *y*. 1. The offender is to be drawn to the gallows on a sledge or hurdle. 2. He is to be hanged by the neck, and cut down alive. 3. His entrails are to be taken out while he is alive. 4. His head is to be cut off. 5. His body is to be divided into four parts. 6. His body and head to be at the king's disposal *z*.

The sentence of women is to be drawn and burnt; but a late statute, has changed the burning into hanging *a*.

The king may pardon all the punishment except beheading; for decapitation being part of the judgment, the law is satisfied, and the judgment sub-

*y* Princ. Pen. Law 146.

*z* 4 Blac. Com. 92. See Sir. E. Coke's horrid and merciless description of the sentence, in the presence of seven criminals he was condemning. 1 Sta. Tri. 243.

*a* 30 G. 3. c. 48.

stantially

stantially executed *c.* At Lord *Strafford's* execution, it was contended by Lord Ruffel, that the king could not remit any part of the sentence. But when the same Lord Ruffel in his own case, applied for pardon, the king remitted the more ignominious part of the sentence. "Lord Ruffel," said he, "shall find, that I am possessed of that prerogative, which in the case of Lord *Strafford*, he thought proper to deny me" *d.*

There are no accessories in high treason, all are principals, for on account of the enormity of the crime, the law allows of no discrimination of guilt; those who conspire, aid, or abet the committing of any treason, whether present or absent, are all principals *c.* But this applies only to those cases, where the *intent* itself is treason, as in

Principals and accessories.

*c.* 1 Hale 351.

*d.* 8 Hume's Hist. Eng. 193.

*e.* 1 Hale 233.

compassing, for in the inferior species, no advice to commit them unless they are actually committed, will make a man a principal traitor *f*. Every one who *knowingly* receives or comforts a traitor is a principal; as was resolved upon the attainder of *Abington*, for receiving Garnet the jesuit, a conspirator in the powder plot. But Mrs. *Lisle's* sentence was illegal: the act reversing her attainder, reciting, "that she was by  
" an irregular and undue prosecution  
" indicted for entertaining and con-  
" cealing John Hicks, a false traitor,  
" knowing him to be such, though the  
" said Hicks was not at the time of the  
" trial, attainted or convicted of any  
" such crime *g*.

*f* 4 Blac. Com. 35, 36.

*g* 4 Sta. Tri. 130. Foster 345, 346.



## C H A P. II.

*Of Misprision of Treason.*

**MISPRISIONS** are such high offences as are not capital, but nearly bordering thereon. And are of two kinds; negative, which is concealing something, which ought to be revealed; and positive, which is committing some unlawful act.

Misprision of treason.

*Misprision of high treason* is either by the common law or by statute, it consists in the bare knowledge and concealment of treason; without any degree of assent: for assent or approbation make the party a principal traitor *a*.

In the time of Bracton, concealment of high treason, amounted to treason.

*a* 4 Blac. Com. 120.

But

But afterwards by the 1 & 2 Phil. & Mar. c. 10. f. 8. it was declared, that concealment of high treason, shall be deemed misprision only, and the offenders shall suffer and forfeit as in cases of misprision *b*.

By the old common law, if a man was privy to a treason, he was bound to reveal it to the king or his council, within two days, even to the neglect of his most urgent affairs; and if after that time he concealed it, it was deemed an assent *c*. If a person goes into the company of conspirators, not knowing of their design, and hears their discourse without saying any thing, and never afterwards attends their consultations, such concealment is misprision *d*.

To make a misprision, there must be a *knowledge* of treason, for a man cannot

*b* 1 Hale's P. C. 372.

*c* Bracton, lib. 3. Fol. 118. a.

*d* Kelyng. 17.

be said to conceal, what he does not know. Therefore if a man is told there will be a rising, without being made acquainted with the persons who are to rise, or with the nature of the plot, this is no misprision in him, for he had no actual knowledge of treason. But if a man knows of a treason, and some of the conspirators, and talks to other men about it in general terms only, this will not acquit him of misprision; for notwithstanding the discourse, the treason and traitors are still concealed. *e.* Compassings or imaginations against the king by word, without an overt act, constitute misprision. By the 25 Hen. 8. c. 12. *Fisber* Bishop of Rochester was attainted of misprision, for concealing certain predictions made against the king, by the famous visionary, the Holy Maid of Kent; one of whose prophecies denounced, that if the king did not desist from his intended divorce, from Anne Bullen, he should

*e* Kelyng. 21, 22.

not continue king more than a month after *f*.

If an act of parliament subsequent to 1 Mar. c. 1. *f*. 3. makes a new treason, the concealing of it is certainly misprision. Because misprision not being a substantive crime, it relates to whatever is made treason, and is its necessary consequent and result, as the shadow follows the substance. Though the 25 Ed. 3. does not by express words enact misprision to be an offence, yet as the 1 Mar. enacts there shall be no misprision but by the 25 Ed. 3. this latter act when it settles those things that are treason, likewise virtually and consequentially, makes the concealing any of them misprision *g*.

But there are some offences, that are made positive misprisions, without being consequential or dependent upon the

*f* 11 Sta. Tri. 7.

*g* 1 Hale P. C. 334.

making

making of treason. As by the 13 Eliz. c. 2. f. 5. concealing and not discovering to some of the privy council, within six weeks, the offer of any instrument, or persuasion of reconciliation, to the see of Rome. By the 14 Eliz. c. 3. the forgers of any *foreign* coin, which is not current in this kingdom, and their procurers, aiders and abettors, incur the penalties and forfeitures of misprision of treason. As also, by the 23 Eliz. c. 1. f. 3. the wilful aiders, and maintainers, of those who endeavour to withdraw the queen's subjects from their obedience, or from the established religion.

It is incumbent upon every one who is privy to a treason, to reveal it with all possible expedition to the king, a privy counsellor, or a magistrate *b*.

But it is doubted, whether a discovery to a private person, not invested

*b* 4 Burn's Justice Tit. Treason.

with



with the powers of magistracy, is that publick exculpation which the law requires *i*. Neither will it be an exemption from the offence to discover that there will be a rising in general, without disclosing the persons intending to rise *k*. If treason is disclosed to a confessor, it is his duty to make a discovery, for confession conveys not the privilege of secrecy *l*. Therefore in the reign of Henry the Fifth, *Randolph*, the queen dowager's confessor, accused her of treason *m*. And *Garnet* the jesuit, set up an ineffectual excuse, that he was bound to keep secret, whatever was disclosed in sacramental confession *n*.

Punishment.

The *punishment* of misprision, is imprisonment during life, forfeiture of all goods, debts, and duties for ever, and

*i* Kelyng. 22.

*k* 1 Hawkins's P. C. 87.

*l* 2 Inst. 629.

*m* Rot. Parl. Anno 7. H. 5. nu. 13.

*n* 1 Sta. Tri. 264. 2 Inst. 629.

of

of the profits of lands during life *o*.  
Misprision of *petit* treason is not subject  
to the judgment of high treason, but  
is punishable only by fine and imprisonment *p*.

*o* 3 Inst. 34.

*p* 1 Hale P. C. 375.

## C H A P. III.

*Of Felonies and other Offences against the  
King and his Government.*

OTHER offences immediately affecting the king or his government are felonies injurious to his prerogative, *præmunire*, and misdemeanors.

I. *Felony*, according to its general acceptation, comprizes every species of crime, which occasioned at common law, the forfeiture of lands or goods. But it is considered by modern interpretations, as a generical term, including all capital crimes inferior to treason *a*. Felonies against the king's *prerogative* are not such offences as directly attack the personal attributes of sovereignty,

*a* 4 Blac. Com. 98.

but

but tend to diminish the dignity of his political authority, or weaken the sinews of his government. It not being intended, to speak of offences relating to the coin or bullion, or of relieving popish priests. The other felonies are,

1. Against the council.
2. Serving a foreign state.
3. Imbezzling stores of war.
4. Desertion from the army or navy.

*The privy council*, being a selection of such statesmen as are eminent for their birth, wisdom, or talents, in order to advise and defend the king, and to give energy and stability to his executive government, the law severely punishes any attempt or conspiracy to destroy their lives. The 3 & 4 Ed. 6. c. 5. being repealed, which made the intent to kill or imprison a privy counsellor felony; it is enacted by the 3 Hen. 7. c. 14. that if any of the king's household servants conspire or imagine to take away the life of a privy

Felonies  
against  
the privy  
council.

F

coun-

counsellor, it is felony, though nothing be actually done. This statute was made in consequence of a dangerous conspiracy by some of Henry the Seventh's household servants: it therefore extends to the king's sworn servants only, whose names are entered on the cheque-roll of the household, and are under the rank of a lord. By this statute the benefit of clergy is not taken away. But by the 9 Ann. c. 16. it is enacted, that if any person shall unlawfully assault, strike, wound, or attempt to kill any privy counsellor, in the execution of his office, he shall suffer death as a felon, without benefit of clergy. This statute was made in consequence of the daring attempt of the Marquis *De Guiscard*, who stabbed Mr. Harley with a penknife, when under examination before a committee of the privy council, for traiterously corresponding with France.

Serving  
foreign  
states.

*Serving foreign states* being generally a dereliction of that allegiance which a sub-



a subject owes to his natural prince, was restrained and punished by the legislature, in the reign of James the First, when the restless machinations of the Jesuits abroad, were aimed at the destruction of the government, and the introduction of the popish religion. By the 3 Jac. 1. c. 4. s. 18. every subject that goes out of the kingdom in order to serve, or after his departure, voluntarily serves any foreign state, without taking the oath of obedience *b*, prescribed by the statute, is declared a felon. It is also felony, by section 19. If any gentleman or person of higher degree, who has borne any office or place in the army, engages in foreign service, in this manner, without previously entering into a bond with two sureties *c*, not to enter into, or consent

*b* See the oath Sec. 15. This oath of obedience is abrogated by 1 W. & M. Sec. 1. c. 8. s. 2. and the new oaths of allegiance and supremacy enjoined in its room.

*c* The penalty of the bond is twenty pounds; see the condition Sec. 20. and Sir E. Coke's commentary upon the statute. 3 Inst. 80, 81.

to any plot or conspiracy against the king; and if he knows of any such, to disclose it within proper time to the king, or the lords of the privy council.

Farther by the 9 Geo. 2. c. 30. s. 1. to remedy the seduction of soldiers to enlist for foreign service, it is enacted, that if any subject of Great Britain shall enlist or enter himself; or any person shall procure him to be enlisted or entered; or shall hire, or retain, or procure any subject to go beyond the seas, or embark for the purpose of serving any foreign state, as a soldier, without licence obtained under the king's sign manual; he shall suffer death, as in cases of felony, without benefit of clergy. But by section 3. if any person so enlisted or enticed, shall within fourteen days, discover his seducer, so that he may be apprehended and convicted of the offence, this will be an indemnification *d*. Moreover, by the

*d* This act is enforced by 29 Geo. 2. c. 30. s. 4. which adds, although no enlisting money is actually paid or received.

29 Geo.

29 Geo. 2. c. 17. f. 1. if any subject enters into the military service of the French king, as a commissioned or non-commissioned officer, without licence under the king's sign manual, he shall be deemed guilty of felony, without benefit of clergy *c.*

*Imbezbling or destroying the king's armour, stores, or shipping*, being a crime easily committed, and of fatal tendency, particularly in time of war, is punished by the 31 Eliz. c. 4. which declares that if any person having the charge or custody of any armour, ordnance, munition shot, powder or habiliments of war; or of victuals provided for victualling of soldiers or mariners; shall for the sake of gain, or for the purpose of hindering her majesty's service, im-

Im-  
bezbling  
stores.

*c* By the same statute, Sec. 5. the accepting a commission in the Scotch Brigade, in the service of the States General, and not taking the oaths of allegiance and abjuration, within six months, and transmitting a certificate thereof and of the commission, to the secretary at war, incurs the penalty of 500*l.*

F 3

bezzle,

bezzle, purloin, or convey away the same, to the value of twenty shillings, at one, or several times, he shall be proceeded against as a felon *f*. But because the benefit of clergy is allowed by law, except it is expressly taken away, which was not the case in the preceding statute, and this offence having been frequently committed, the 22 Car. 2. c. 5. s. 2. takes away the benefit of clergy; as also by section 3. from stealing or imbezzling any sails, cordage, or other naval stores to the value of twenty shillings *g*. And by the 22 Geo. 2. c. 33. s. 25. every person in the fleet, who shall unlawfully burn or set fire to any magazine or store of powder; or to any ship, boat or vessel; or to the tackle or furniture of the same; provided it does not belong to an enemy, pirate, or rebel,

*f* This act has five excellent provisions, worthy of imitation, in all like cases of new felonies. 3 Inst. 79.

*g* The judge is empowered after sentence of death, to transport the offender for seven years.

shall



shall suffer death; being convicted of the offence, by the sentence of a court martial. Lastly, by the 12 Geo. 3. c. 24. to set on fire, burn, or destroy any ships or vessels of war, whether on float, building, built, or repairing; or any arsenals, magazines, dock-yards, rope-yards, victualling offices; or any buildings erected therein, or belonging thereto; or to any military, naval, or victualling stores, or other ammunition of war; or the places where they are deposited; is felony without benefit of clergy *b*.

For the crime of *desertion*, both the ancient and modern law of England has inflicted the punishment of death *i*. It is felony by the 18 Hen. 6. c. 19. for any soldier after receiving his wages, not to join his captain, or to depart

Deser-  
tion.

*b* For the punishment of other imbezlements see 9 and 10 Wil. 3. c. 41. 1 Geo. 1. Stat. 2. c. 25. 9 Geo. 1. c. 8. f. 3. 17 Geo. 2. c. 40. f. 10. Ld. Raym. 1104.

*i* 3 Inst. 87.



from the king's service without proper licence. The 2 and 3 Ed. 6. f. 6. takes away the benefit of clergy; but this statute seems to apply only to desertion after a war: but it is taken away by the 7 Hen. 7. c. 1. a subsequent statute which extends the offence to mariners and gunners, does not oust these last offenders of clergy *k*.

There is a case in the books, which Charles the First commanded the judges to resolve. A soldier having received press-money, ran away from the conductor, the question was, whether this was felony. It was argued by Sir George Croke, and two judges, that a departure from a *conductor* was not what the statute intended, which specifically mentioned a *captain*. But all the other judges determined, that though a penal statute *l*, yet, being made for

*k* 5 Eliz. c. 5. f. 27.

*l* 7 Hen. 7. upon this statute several soldiers were afterwards attainted and executed. Coke's 6. Rep. 27. a. the case of soldiers.

the benefit of the publick service, it ought to be construed liberally, according to the intent of the makers; and that a conductor was a captain *m*.

Thus much for desertions in time of war, when it is expedient to establish the severest regulations; but in time of peace, some relaxation of military rigor, would not occasion much inconvenience. However the act, which passes annually, "to punish mutiny and desertion," makes no distinction of this kind: for if any officer or soldier, at any time deserts, or lifts in any other regiment, he shall suffer whatever punishment a court martial inflicts, though it extends to death itself *n*.

*m* The soldier's case, Cro. Car. 71, 72. Another doubt arose, that as the felony was appointed to be tried before the justices of peace at their sessions, whether the justices of assize, or of oyer and terminer could try it; though this was not resolved, the general opinion was, that the justices of oyer and terminer might try it by their commission.

*n* A like power over the *marines*, is given to the Lords of the Admiralty, by another annual act, for the regulation of the marine forces, while on shore.

II. The

*Præmunire.*

II. The next offence, though not capital, affecting the king and his government, is *præmunire* o. This, according to its original institution, was of a mere ecclesiastical nature, and consisted in maintaining and supporting the power of the Pope. The first effectual attempt to restrain the despotic power of the Popes, who reigned as lords of the terrestrial globe, was made in the thirty-fifth year of that wise and vigilant monarch Edward the First; and is the foundation of the subsequent statutes of *præmunire*. But that which is generally referred to as the statute of *præmunire* is the 16 Ric. 2. c. 5. which was intended to prevent the procuring from Rome translations and nomina-

• So called from the words of the writ preparatory to the prosecution thereof *Præmunire Facias A. B.* cause A. B. to be forewarned, that he appear before us, to answer the contempt wherewith he stands charged. But both the writ and the offence are in common speech called *Præmunire*.

tions

tions to benefices *p.* By the 25 Hen. 8. c. 20. f. 7. if any dean and chapter shall refuse to elect, within twenty days any person nominated by the king, to be bishop; or any archbishop or bishop refuse to consecrate him; they shall incur the penalties of *præmunire*. This act restored to the king the prerogative of nominating to bishopricks, and yet preserved the established forms of election.

Thus far *præmunire* was kept within its proper bounds, opposing the encroachments of the Pope. But the legislature found it convenient to transfer the penalties, to offences of a temporal nature; some of them having no relation to the original mischief. Dero- gating from the king's common law courts, was a high offence at common law. By the 27 Ed. 3. stat. 1. c. 1. it is *præmunire* for any person to draw

*p* Such instruments were called Bulles. Purchasing *provisions*, was when the Pope provided a living, before the incumbent was dead.

any



any plea out of the realm, the cognizance of which belongs to the king's courts, or to sue in any other court to defeat or impeach the judgments given in the king's courts. In the reign of James the First it was a question; whether a court of equity could give relief, after or against a court of law. The words, *or sue in any other court*, seem to have created the doubt: and indictments were preferred against all the parties in a suit in chancery, for incurring a *præmunire* by questioning in that court, a judgment obtained in the court of king's bench by fraud and imposition. The decision was given in favour of the courts of equity, notwithstanding the powerful arguments advanced by Sir Edward Coke, who presided in the king's bench, and instituted this inquiry *q*. And certainly, a court of equity being qualified to correct the rigors and inconveniences of the common law, is prohibited only

*q* 3 Inst. 122, 123. Id. 4. 86, 87. 1 Bull. 197.



from examining the judgment; and not from administering relief, in cases where that judgment is obtained through fraud and false suggestions *r.* Upon this statute an indictment of *præmunire* was drawn against Sir Anthony Mildmay, a commissioner of sewers for committing a man to gaol, for refusing to release a judgment at law, obtained against the commissioners for an illegal taxation *s.* It has been said that suits in the Admiralty or ecclesiastical courts, are within the 16 Ric. 2. c. 5. which prohibits any process at Rome or *elsewhere*, if they concern matters belonging to the cognizance of the common

*r* This court notwithstanding the statute, may prevent such judgments from being put into execution. It is a power essentially inherent in a court of equity. And since it has a concurrent jurisdiction with the common law in matters of fraud, Sir E. Coke has been much blamed for his dispute with Lord Ellesmere, and attempting to deprive the chancery of this part of its jurisdiction. See 1 Mod. 59. 2 Keb. 156. Dr. and Stud. Dial. 1. c. 18. and 3 Blac. Com. 54.

1 Cro. Jac. 336. 2 Bull. 299.

law.

law. But it is the better opinion, that if the matter appears not by the libel itself, but by the defendant's plea, to be of temporal cognizance; as if the plaintiff libels for tithes, and the defendant pleads they were severed from the nine parts, which made them a lay-fee; then it is not within the statute; because it is not apparent, that either the plaintiff or judge knew they were severed *t.*

Other *præmunires* are acting as brokers or solicitors in usurious contracts, and taking more than *ten per cent.* interest by the 13 Eliz. c. 8. f. 4. *u.* Causing any stay of proceedings, otherwise than by writ of error or attain, in an action for loss or damage done to goods, under pretext of any monopoly; provided notice is given, that the action is grounded upon the 21 Jac. 1. c. 3.

*t.* 3 Inst. 120, 121. 1 Hawkins 80. The question must be whether the cause is within the jurisdiction of the courts, and the thing be demandable and recoverable therein.

*u.* Cro. Jac. 252.

which

which makes void all monopolies *v.* To obstruct the process of making gunpowder, or to prevent the importation of the ingredients of which it is made, by virtue of a pretended authority of the crown, by the 16 Car. 1. c. 21. f. 4. Or obtaining an exclusive licence for making, or importing gunpowder, arms, or ammunition, by way of merchandize, except for the immediate furnishing his majesty's publick stores by the 1 Jac. 2. c. 8. Seizing the property of another, under colour of purveyance, or impressing any carriage by way of pre-emption by the 12 Car. 2. c. 24. f. 13, 14. Also causing delay in any action brought on this statute, except by authority of the court, where it is depending. Maliciously and advisedly asserting, by speaking or writing, that both or either house of parliament have a legislative authority, without the king, by the 13 Car. 2. c. 1. To send any subject of the realm

*v.* By sec. 4. of this act, the party shall recover, treble damages, and double costs.

a pri-

a prisoner beyond the seas, or advising or assisting therein by the *habeas corpus* act, 31 Car. 2. c. 2. s. 12. All these are *præmunires*; and this last statute, besides the penalty of five hundred pounds, renders the offenders incapable of any pardon.

In more modern times, by the 1 Wil. and Mar. sess. 1. c. 8. Persons of eighteen years of age refusing to take the new oaths of allegiance, and supremacy, prescribed by that act, upon tender by the proper magistrate, are subject to the penalties of *præmunire*. And by the 7 and 8 Wil. 3. c. 24. serjeants, or counsellors at law; proctors, attornies, and all officers of courts; practising without taking the oaths of allegiance and supremacy, and subscribing the declaration against popery; whether the oaths are tendered or not. By the 6 Ann c. 7. s. 2. asserting maliciously and directly by preaching, teaching, or advised speaking; that the then pretended



tended Prince of Wales, or any other person otherwise than according to the acts of settlement and union, hath any right to the throne of these kingdoms; or that the king and parliament cannot make laws to limit the descent of the crown, is *præmunire w.* By 6 Ann. c. 23. s. 10. if the assembly of peers of Scotland, convened to elect their sixteen representatives to sit in the British parliament, presume to treat of any other matter, except the election, they incur the penalties of a *præmunire*. By 6 Geo. 2. c. 18. s. 18, 19. all undertakings tending to the prejudice of trade, and subscriptions countenancing such undertakings; or presuming to act as a corporate body without legal authority; or raising, or pretending to raise transferrable stocks, or acting under obsolete charters; such proceedings are illegal and void, and incur the penalties

*w* We have before seen, that writing, printing, or publishing the same doctrines, amounted to *high treason*, by the same statute.

G

of



of *præmunire* x. Lastly, by 12 Geo. 3. c. 11. no descendant of the body of George the Second, except the issue of *princesses* married into foreign families, shall be capable of contracting matrimony, without the previous consent of his majesty, signified under the great seal, and declared and registered in council; and every marriage, and matrimonial contract without such consent, is null and void to all intents and purposes whatsoever. But, if any such descendant, who has attained the age of twenty-five, gives notice to the privy council of his intentions, he may, after the expiration of twelve calendar months, contract a marriage, without the previous consent of his majesty, which shall stand good; unless, before the expiration of the said year, both houses of parliament expressly declare their disapprobation of such intended marriage.

x These undertakings from the fatal experience of the failure of the South-sea project, were called *Bubbles*.

And

And any person presuming to solemnize, assist, or be present at the celebration of any such prohibited marriage, shall incur the pains and penalties of the statute of *præmunire*.

The *pains and penalties of præmunire* are very severe. "After conviction, the defendant is put out of the king's protection; his lands, tenements, goods and chattels, are forfeited to the king; and his body is to remain in prison during the king's pleasure." Such lands as are *entailed*, are saved from forfeiture. By this punishment the offender is put out of the protection of the law, and can therefore bring no action. By the common law there was no punishment for killing a man attainted of *præmunire*, for he might be treated as the king's enemy, and to kill an enemy, was lawful. But the 5 Eliz. c. 1. s. 21. expressly forbids killing any person attainted of *præmunire*.

Pains and  
Penalties.

Whether there can be any accessories in *præmunire* is doubted *y.*

III. Misdemeanors are libels scandalizing the king, or his government, or contempts derogating from his title or prerogative.

Libels.

A *libel* is the malicious defamation of another by printing or writing; and exposes him to publick hatred, contempt or ridicule. And since it tends to a breach of the peace, it has been held a publick offence at common law, and received the utmost discouragement from courts of justice.

The star chamber soon after the invention of printing, took to itself the jurisdiction over publick libels; it presently usurped a general superintendence over the press, and exercised a legislative power over all publications: it

*y* Staunf. P. C. 44.

*z* 7 Sta. Tri. 29, 30, 31. 6 Hume's Hist. Eng. 165, 166. The courts of *Westminster-Hall* did not want

it prohibited books, it inflicted penalties, it established an *oligarchy* of licensers, and invested them with absolute power to govern the republic of letters. This odious tribunal was abolished in 1641, but the long parliament assumed all its powers, which were continued during the whole time of the protectorship. Two years after the restoration, an act was passed reviving the republican ordinances *a*. This act expired in 1679, but was revived in 1692, and was continued till 1694, when all restraints were taken off, and the press made open and free. The consequence of this liberty of the press has been, gross licentiousness stealing upon the public mind, by gradual but imperceptible advances, till it has terminated in a point, beyond which it cannot go.

want the power of holding pleas in cases of libels; but the attorney general for good reasons chose rather to proceed in the court of *Star Chamber*; which is the reason why there are no cases of libels in the *King's Bench* before the restoration.

*a* Against this ordinance Milton wrote his well known pamphlet *Areopagitica*.



In the moral world the eye is disgusted with the picture of atheism, obscenity, and ridicule ; and in the political, with doctrines subversive of civil society. Governments therefore watch with a vigilant eye, the demeanour of books, as well as men ; and execute judgment and justice upon their authors, as upon criminals. For books are not absolutely dead things, but contain a potency of life, and activity of soul, as efficacious as their parent. They possess the vigour and prolific qualities of the teeth of dragons, in the fables of antiquity ; wherever they are set, there spring up armed men.

It is not to be presumed that a libel is levelled personally at majesty, it generally attacks the characters of ministers, or the measures of government. But charging the king with a personal vice or defect *b* ; or that he wants wis-

*b* The king against Almon, M. 29 Geo. 3.

dom,



dom, valour, or prudence *c*; or charging him with the breach of his coronation oath, are libels. Also spreading false rumours concerning the king's intentions, as that he designs to grant a toleration to papists *d*. If a man attacks the person of majesty by low and licentious scurrility, in verse, he commits an act of audacious indecorum; and may be punished by a court of justice, with the humiliating and severe pains of the pillory.

Libels against the government or men in power, are the objects of bitter aversion from the laws, not because they investigate the principles of government, or canvass political measures, which with decency and propriety is permitted to be done; but because they engender sedition; flatter faction; propagate fictions and falsehoods; and im-

*c* Cro. Car. 117.

*d* The case of Alexander Scott for publishing false news, Old Bailey, June 1778.

pose on credulity. The common causes of libelling are mistaken principles, disappointment, and revenge; the effects, sedition and discontent among the people. If statesmen are the objects, it will generally appear, that to produce the desired effect, besides the necessary ingredient of falsehood, the private and publick character of the libelled, are artificially blended together; as if the follies of the drawing room, or the foibles of domestic recreations, had an essential influence on the actions of the senate.

If in private life, the calumniator of reputation, the best pillar of prosperity, be criminal; much more so is he, who endeavours to destroy, what is the only support of men in publick stations, the confidence of the nation.

Charging the Legislature with corruption; or asserting that the government is unjust or tyrannical; or that the ministers are men of no integrity and ability;

ability ; or that they have ruined the country, and are enemies to the publick good ; are libels against the king's government ; as disseminating discord and disaffection in the minds of his subjects, and bringing into disrepute the administration of affairs. For the energy and strength of a government depend upon the opinions entertained of the wisdom and virtue of its measures ; and no government can stand against popular clamour and disgust. Since the revolution, the pen of sedition has been very busily employed. The case of *John Tutchin* was publishing the following libel, called the *Observer*. That if we judge from our national miscarriages, perhaps no nation in Europe, has felt more the influence of French gold, than England. That we found out offices for men, not men for offices ; and that by this, the excise, customs, and other branches of the revenue, were intolerably sunk ; and that the navy of England had been hitherto perfectly  
be-

bewitched *e.* The case of Richard *Franklin*, was publishing a letter, in a paper called the *Craftsman*, under colour of an extract from the Hague, charging the ministers with an infraction of the Hanover treaty, with deserting allies, and perfidiously exposing the country to great hazards and expences *f.* The trial of *Owen* was for printing and publishing the case of Alexander Murray, Esq; which charged the house of commons with illegal and unconstitutional proceedings, upon the the Westminster election for members of parliament. The house of commons voted it a libel; but upon the trial the defendant was acquitted for want of proper evidence *g.* And in the case of John *Horne*, Esq; the publication of the following passage was a libel. "At a meeting of the *constitutional society*, a gentleman proposed that a subscrip-

*e* At Guildhall 1704. 5 Sta. Tri. 527.

*f* Sitings at Westminster before Ld. Raymond, December 1731. 9 Sta. Tri. 255, 256.

*g* 10 Sta. Tri. 197, 198. 208.

" tion

"tion should be entered into, for the  
 "purpose of raising a sum to be ap-  
 "plied to the relief of the widows, or-  
 "phans and aged parents of our beloved  
 "*American* fellow subjects, who faithful  
 "to the character of Englishmen, pre-  
 "ferring death to slavery, were for that  
 "reason inhumanly murdered by the  
 "king's troops<sup>b</sup>." The dean of *St. Asaph's*  
 case was publishing a pamphlet called  
 "The principles of government, in a  
 "dialogue between a gentleman and a  
 "farmer." in which it was insisted, that  
 a free state was only a numerous and  
 powerful club; that the people were  
 deprived of the right of voting for re-  
 presentatives in parliament; that in con-  
 sequence of this, they were robbed of  
 their money: and recommending them  
 to procure arms, and be conversant in  
 the manual exercise, in order to oppose  
 the government, and redress griev-

<sup>b</sup> In the King's Bench, Nov, 1777.—11 Sta. Tri.  
 264. 268. See the proceedings against John Peter  
 Zenger, for a libel upon the government of the pro-  
 vince of New York. 9 Sta. Tri. 276.



ances *i*. The case of *Lord George Gordon*, was writing a pamphlet himself, addressed to himself, entitled "The prisoner's petition, to the right honorable "Lord George Gordon, to preserve "their lives and liberties, and prevent "their banishment to Bottany Bay." The purport of the libel was, that the government was tyrannical, the felony laws cruel, and that the judges condemned the people contrary to law *k*. Upon the trial of *Stockdale* for publishing "A review of the principle charges against "Warren Hastings, esquire, late governor general of Bengal," the following matter was held a libel on the house of commons. That the more deserving a man rendered himself of his country, the more he was exposed, to the vindictive proceedings of parliament. That the house of commons in impeaching

*i* The king against the dean of St. Asaph for a libel; at the assizes at Shrewsbury, August 1784.

*k* At Guildhall 1787. See also the trial of Thomas Wilkins for printing and publishing the foregoing libel.

Mr.

Mr. *Hastings*, had perverted their accusatorial character, and were influenced by motives of personal animosity; and not by the principles of publick and deliberate justice *l*. The last, is a recent case, for a libel upon the revolution, and settlement of the crown, upon the bill of rights, the legislative, executive, and judicial powers; and may therefore properly be termed an *accumulative* libel. The doctrines maintained were that the deliverance of this country by the prince of Orange, introduced only the semblance of liberty; that the regal part of our government was, an oppressive and abominable tyranny; and that the whole legislature was a direct usurpation *m*.

Contempts against the king's *title*, are either by denying his title; or refusing to take the oaths required by law for

Con-  
tempts  
against  
the king's  
title.

*l* In the court of king's bench Westminster, December 1789, before Lord Kenyon.

*m* Proceedings against Thomas Paine, at Guildhall, December 1792, before Lord Kenyon, and a special jury.

the

the support of his government. These tend to raise tumults and disorders in the state, and alienate the affections of the people.

If a man in heedless and unadvised discourse maintains, that the king is an usurper; or that another has a better title to the crown; or that the common laws of the realm, not altered by parliament, ought not to direct the descent of the crown of England; these are high contempts, inclining to favor the pretensions of others, and shaking the stability of government *n*.

By the 1 Geo. 1. stat. 2. c. 13. every person who is admitted into any office civil or military; and all members on the foundation of colleges or halls in the two universities, who shall have attained the age of eighteen years; and every person acting as a serjeant or counsellor at law; as an attorney, soli-

*n* 1 Hawk. P. C. 93. If the discourse is advised it amounts to *præmunire*.

citor,

citor, or as an officer in any court of justice in England; shall take and subscribe the oaths of allegiance, supremacy and abjuration at one of the courts of Westminster, or at the general quarter sessions of the peace where they shall reside.

And it is enacted by sect. 16 & 17 that no peer shall vote or make his proxy, or sit in the house of peers, during any debate: and that no member of the house of commons, shall vote or sit, during any debate in the said house after the speaker is chosen, until he shall have taken the above mentioned oaths.

By sect. 10. of this act two justices of the peace, or any other persons specially appointed by his majesty, by order in the privy council, or by commission under the great seal, may tender these oaths to any person, they shall suspect <sup>o</sup>, to be dangerous or disaffected to his

<sup>o</sup> It seems that a bare suspicion is not sufficient, there must be some good cause of suspicion, which is traversable. 1 Hawk. P. C. 98.

majesty



majesty or his government; and they shall certify the refusal of any person to take the oaths, to the next quarter sessions, which shall from thence be certified, by the clerk of the peace of the county, into the court of Chancery or King's Bench.

Con-  
tempt  
against  
the king's  
preroga-  
tive.

Contempts against the king's *prerogative* consist in refusing to assist him for the good of the publick; espousing the interests of a foreign state; or disobeying his lawful commands, or prohibitions.

It is a great contempt for any subject to deny the king that assistance in his councils or wars, which by law he is bound to give; as for a peer not to come to parliament at the day of summons; or for a privy counsellor to refuse giving his advice on affairs of state; or for any private subject to refuse serving the king in person, if he is able, or to find another, if he is unable, for the defence of the kingdom, against rebels  
or



or foreign invaders. Also neglecting to join the *posse comitatus*, or power of the county, being required so to do, by the sheriff or justices, according to the statute 2 Hen. 5. c. 8. which is a duty incumbent upon all, that have attained the age of fifteen years, are under the degree of nobility, and able to travel *p*.

The doing or receiving any thing, that may create an undue influence, in favor of foreign powers; as taking a pension from any foreign state, without the king's license, even though they are in amity with us, is a contempt against the king's prerogative *q*.

Disobeying the king's lawful commands, or prohibitions, or his writs issuing out of the courts of justice; or refusing to answer questions proposed by the privy council, respecting the in-

*p* 3 Inst. 144. See articles exhibited against cardinal Wolsey. Art. 27. 4 Inst. 92.

*q* 1 Hawk. P. C. 91, 92.

H

terest

terest of the state; or refusing to give evidence to a grand jury concerning a crime *r*; or not returning from beyond the seas, upon the king's letters for that purpose; or going beyond the seas, against the king's will expressly signified, either by the writ of *ne exeat regnum*, or under the great or privy seal, or by proclamation *s*. All these are contempts against the king's prerogative.

Punish-  
ment.

The punishment of these misdemeanors is fine, pillory, and imprisonment, at the discretion of the court; according to the greatness of the offence, the circumstances of the case, and the rank of the parties: and sometimes disabilities to hold offices and places.

*r* 1 Salk. 278. Lord Preston's case.

*s* 3 Inst. 179, 180. This writ may be directed as well to a layman, as to a clergyman, and upon the suggestion of a private or public matter. *r* Hawk. P. C. 92.

C H A P. IV.

*Of the Proceedings in Cases of High  
Treason, &c.*

**T**HOUGH the offence of treason is not within the letter of the commission of justices of the peace, yet because it is against the peace of the king and of the realm, any justice may upon his own knowledge, or the complaint of others, cause any person to be apprehended, and commit him to prison. And the justice may take the examination of the person apprehended, and the information of those who can give material evidence against him, and put the same in writing, and also bind over those, who can give any material evidence, to the justices of oyer and terminer, or gaol delivery; and certify

the proceedings to that court where he binds over the informers.

A justice having no power to bail the offender, must commit him: and it may be advisable to send an account immediately to a secretary of state. The court of king's bench having power to bail in all cases whatsoever, may admit a person to bail for treason done upon the high seas *a*; or a person committed for high treason generally, if four terms have elapsed, and no prosecution commenced *b*. The commitment may be for high treason generally; and it is not necessary to express the overt act in the warrant.

The regular and legal way of proceeding in cases of treason, and misprision of treason, is by indictment. An information cannot be brought in capital cases, nor for misprision of treason. Antiently an appeal of high trea-

*a* 2 Hale P. C. 44. 2 Hawk. P. C. 59, 60.

*b* Holt 83. R. v. Wyndham, 1 Strange 2.

son,

son, by one subject against another, was permitted in the courts of common law, and in parliament; and if committed beyond the seas, in the court of the high constable and marshal *c.* The method of proceeding against a peer for high treason, is by parliamentary impeachment; but a commoner can only be impeached for high crimes and misdemeanors.

The *indictment* is an accusation at the suit of the king, by the oaths of twelve men of the same county, wherein the offence was committed, who find the bill brought before them to be true. By the common law, no grand jurors can indict any offence whatsoever, which does not arise within the limits of the precincts for which they are returned; therefore they are enabled by

*c* The cognizance of appeals in these latter courts, still continues in force. 4 Blac. Com. 314. In 1631, a trial by battel was awarded by the court of chivalry, on an appeal of treason, by Donald Lord Rae, against David Ramsey. 11 Sta. Tri. 124.



several statutes, to inquire of treasons committed out of the county.

In treating of the indictment, will be considered, 1. The Venue. 2. The Charge. 3. The Overt Act. 4. The Conclusion.

Venue.

The *Venue* is the place laid in the indictment where the offence was committed, and from whence the jury are to come to try the fact. It is generally true, that the venue must be laid in that county where the offence was actually committed, unless a statute gives a power to the contrary. If treason is committed in several counties, the venue may be laid in any one of them *d*. If treason is committed out of the realm, the venue may be laid in any county within the realm, where the treason is appointed to be enquired into *e*.

*d* 4 Sta. Tri. 640.

*e* 4 Blac. Com. 303.

*Wales* is within the kingdom of England. But if any treason is committed in *Wales*, the venue may be changed to the next adjoining county in England, where the king's writs run *f*. In *Chedley's* case, who was indicted for petit treason, it was doubted whether a *certiorari* lay to remove the indictment from the grand sessions at Anglesea into an adjoining county *g*. But it seems a *certiorari* may issue for a special purpose, as to quash the indictment for insufficiency; or to plead a pardon; but not as to trial of the fact, but it must be sent down by *mittimus b*.

By the 7 An. c. 21. If treason is committed by any native of *Scotland*, upon the high seas, or in any place out of the realm of Great Britain, it may be inquired of in any shire or county, that is assigned by the commission.

*f* 2 Hawk. P. C. 315, 316.

*g* Cro. Car. 331.

*b* 1 Hale P. C. 158.

Therefore the venue may be laid in such county as if the treason was actually committed there.

If treason is committed in *Ireland*, it may be laid and tried in England, in pursuance of the 35 Hen. 8. c. 2. This was resolved in Sir John *Perrot's* case *i*. In the case of Lord *Macguire*, the venue was laid in Middlesex, though the war was levied against the king in Ireland *k*.

The indictment must be drawn with great form and accuracy: for there can be no conviction of treason, where the crime is not formally laid, even though the facts charged amount to treason *l*. The day laid in the indictment is circumstance and form only, and not material in point of proof. Therefore the jury are not bound to find the defendant guilty on that par-

*i* 1 Sta. Tri. 189.

*k* Id. 950.

*l* 2 Sta. Tri. 808, 809.

ticular day ; but may find the treason to be committed either before or after the time laid *m.*

There must be a specific charge of Charge. treason. And since the traiterous intent is the *Gist* of the indictment, the treason must be laid to have been committed *traiterously* ; this word being indispensibly requisite. If the charge is for compassing the king's death, the words of the 25 of Ed. 3. must be strictly pursued. The indictment must charge, that the defendant did traiterously *compass and imagine*, &c. And then proceed to lay the several overt acts, as the means employed for executing his traiterous purposes. Levying war may be charged as a distinct species of treason, according to the statute ; or it may be laid as an overt act of compassing.

*m* This point was determined in Syer's case. 3 Inst. 230. And in Sir Henry Vane's case. Kelyng. 16.

There



Overt act.

There must be an *overt act* laid. It is not necessary that the overt act, be laid to have been committed traiterously, because that is not the offence; but if the treason consists not in the intention, but in the act, as levying war, then it must be laid to have been done traiterously *n*. It has been doubted, whether an overt act is required for any other species except that of compassing or imagining the king's death *o*: but since the words of the 25 Ed. 3. "and thereof be provably "attainted by overt act" relate to all the treasons, an overt act is required for each.

Though a specific overt act must be alleged, yet it is not necessary that the whole detail of evidence intended to be given, should be set forth; it is sufficient that the charge be reduced to a reasonable certainty; so that the defendant be apprized of its nature.

*n* Cranburn's case, 2 Salk. 633.

*o* 5 Sta. Tri. 21.

Neither



Neither is it necessary to prove the overt act committed on the particular day laid *p*.

As there must be an overt act laid, so that which is laid, must be proved; for if another act than what was laid, was sufficient, the prisoner would never be provided to make his defence. But if more than one are laid, the proof of any one will maintain the indictment. Also if one overt act is proved, others may be given in evidence to aggravate the crime, and render it more probable *q*.

It has been said, that since every overt act of compassing is transitory, it may be proved in a different county, from where the treason is laid *r*. But in *Layer's* case, Chief Justice Pratt laid it down as clear law, that there must be an overt act proved in the county,

*p* Foster 194. 9 Sta. Tri. 607.

*q* 1 Hale P. C. 121, 122.

*r* Kelyng. 15.

where

where the indictment is laid : and that then, the defendant may be charged with any overt act of the same species of treason, in any county whatsoever s.

The compassing is considered as the treason ; and the overt act as the method of effecting it. Therefore upon the trial of the regicides, the compassing was charged as the treason, and the taking off the king's head, as the overt act ; and the person who was supposed to have given the stroke, was convicted on the same indictment. In this indictment the compassing was laid on the 29 January, 24 of Charles the First, and the murder on the 30th of the same month. It was a question whether the 30th of January, should be laid in the reign of Charles the First, or Charles the Second, since there was no fraction of a day : it was agreed that it should be laid on the 30th day of the same month Janu-

ary; without naming any year of any king *t*.

It was resolved by all the justices, in the case of *Arden* and *Somerville*, that a meeting together of these accomplices to consult touching the manner of effecting the death of Queen Elizabeth, was an overt act to prove the compassing: as also *Somerville's* buying a dagger for the purpose of actually executing the design *u*.

It is sufficient to lay a consultation to kill the king, as an overt act of compassing his death, without laying the manner in which the king's death was to be effected; for the consultation is in itself an overt act.

Levying war is an overt act of compassing. Sir Henry *Vane* was indicted in the king's bench, for compassing the

*t* Kelyng. 10, 11. Foster 193, 194.

*u* Anderf. Part I. p. 104.

death

death of Charles the Second, and the overt act was levying war *v*. But a bare conspiracy to levy war is not an overt act, and was so adjudged in Sir John *Friend's* case. But if it appears, that the design was to kill, depose, or imprison the king, or to put force upon him; and the levying is the ways and means for such purpose, then it is an overt act *w*.

Though words alone do not constitute an overt act, this must be understood with qualifications and exceptions. Words may expound an overt act, to make good an indictment for compassing the king's death. And if they expressly menace the death or destruction of the king, they are sufficient overt acts of themselves: but the words must be alleged to be spoken of the king *x*.

In

*v* Kelyng. 14.

*w* And this distinction was taken by Lord Holt, upon Sir John *Friend's* trial. 4 Sta. Tri. 625, 626.

*x* Stanley's case in Lord Bacon's History of Hen. VII. 2 Shower 413. See several cases for words ante p. 30, 31. William Stayley was executed for words spoken of the king, in *French*. The words in English

In indictments upon the clause of the statute for levying war, which Sir Matthew Hale calls an obscure clause, it is not necessary to lay the day with precision *y*. But there must be an overt act shewn in the indictment, upon which the Court may judge upon the question of fact, whether war is levied or conspired. And this is usually done, by setting forth, that the insurgents were arrayed in a war-like manner; were armed; or were conspiring to procure arms for the purpose of arming themselves *z*.

In an indictment for adhering to the king's enemies, it must be shewn to whom the adherence was; that the court may judge whether the persons adhered to, are the king's enemies or not *a*. But it is not necessary to allege

English were, *I would kill him myself*. The prisoner evasively said, the words alluded to himself, *I would kill myself*. 2 Sta. Tri. 656, 657.

*y* In Sir Harry Gray's case, all the judges were of opinion, he was guilty, notwithstanding the fact was committed, twelve years before the day laid in the indictment. 9 Sta. Tri. 550.

*z* 1 Hale P. C. 150.

*a* 2 Vent. 316. Harding's case.



that the adhering was against the king ; for this shall be intended *b*. There must be an adherence to the king's enemies ; therefore if a subject solicits a foreign state in amity with us, to invade the kingdom, this is not an overt act to convict him of adhering to the king's enemies ; though it is of compassing his death *c*.

Conclu-  
sion.

There is a difference in indictments against natural born subjects and aliens. Every indictment whether against a natural born subject or an alien, for an offence declared treason by the 25 Ed. 3. must conclude, that it was done "against the duty of his allegiance." An attainder was reversed, because the indictment ran, that the defendant not considering the duty of his allegiance, did traiterously wage war against the king &c.: for it was held, that these words do not positively express, but imply only, that the defendant acted against

*b* 5 Sta. Tri. 36.

*c* 1 Hale P. C. 167.

his

his allegiance; and indictments shall not be made good by intendments and implications *d*. But if the offence is made treason by statutes subsequent to the 25 Ed. 3; and the offence is charged in the words of the particular statute, it is sufficient if it concludes, against the form of the statute or statutes; without mentioning allegiance *e*.

An alien *enemy* cannot be *indicted* for treason because the indictment cannot conclude that it was done, against the duty of his allegiance, when in fact he owes the king none at all *f*. An indictment against an alien *amy* must conclude, against the duty of his allegiance, leaving out natural, otherwise it will be fatal, as being laid too specially; for he may owe the king local but not natural allegiance *g*. Neither is the

*d* 2 Salk. 630, 631. Tucker's case.

*e* Id. Ibid.

*f* Ante p. 7.

*g* 4 Sta. Tri. 699, 700. Cranburn's case. See several cases of aliens, quoted in 7 Coke's Rep. Calvin's case, 6. a. b.

word *natural* requisite in indictments, against natural born subjects.

It was resolved, for the sake of greater certainty, that the indictment against the regicides should conclude, against the peace of our late lord the king, &c. and also against the peace of our present lord the king, &c. *b.*

Misdemeanors and libels against the government may be prosecuted either by indictment or information. An information is a suit commenced immediately by the king, and filed *ex officio* by the attorney general. This is a speedy method of prosecution, without waiting for any previous inquiry and finding by a jury; and is invested in the crown, in consequence of the danger of those high misdemeanors, which directly attack the executive government.

The disturbers of government by libels, are seldom so explicit in their mat-

*b* Kelyng. 11.

ter,

ter, that the stamp of criminality can be fixed, *primâ facie*, on their writings. The law therefore, in order to construe the publication according to the intention of the writer, adopts the use of *averments*, which are termed *innuendos*, whose office it is to analyse the matter, and comment on the purport of the libel, and by operating as a copulative, where the matter is dis-joined, and a connection of it essential to the *gist* of the charge, fix the meaning of the language, as it is charged, in reference to the persons or matter alluded to.

Whatever certainty is required in an indictment; the same certainty is necessary in an information. Therefore in every indictment or information, for a libel or misdemeanour, by writing or speaking, there must be a specific charge set forth; a libel may be described either by the sense or substance; or by the particular words; and an indictment or information in either

of these forms will be good *i*. Upon the trial of Doctor *Sacheverell*, Lord Nottingham put a question to the judges, whether the particular words supposed to be criminal, must not be expressly specified in the indictment or information; the judges resolved in the affirmative *k*. But this resolution has been censured by contrary opinions, and cases have been cited where the words were not so specified *l*.

The whole libel need not be set forth, and if any thing qualifies that which is set forth, it may be given in evidence. It has been agreed, that a libel set out "to the following effect" is naught; for the court are to judge of the words themselves, and not of the construction the prosecutor puts upon them. But if the word "tenor" follows, it will correct them: "according to the following tenor"

*i* 8 Sta. Tri. 330.

*k* 5 Ed. 828.

*l* Staley's case. 6 Sta. Tri. 330. R. v. Gripe, Trin. 8 Wil. 3.

imports



imports the very words themselves: for the tenor of a thing is the transcript *m*.

If the libel is described by the sense and substance, exactness of words is not material. But if by the words, "according to the following tenor" a letter or syllable mistaken is fatal. If however, it is for words spoken, literal omissions are not material; for there is no original, with which to compare the words set out *n*.

Having thus considered the *ordinary* modes of proceeding by indictment or information; I shall now briefly touch upon the *extraordinary* mode by impeachment.

An impeachment before the lords, by the commons of Great Britain in parliament, is in the nature of a grand bill

*m* 2 Salk. 417.

*n* Id. 660, 661. The Queen v. Drake.

of indictment, found by the house of commons, and presented to the lords *o*. But there must be a specific charge made, for the lords refused to commit the earl of *Clarendon*, because there was no particular treason mentioned or assigned *p*. The king usually creates a lord high steward by commission under the great seal, before whom the peer is to be tried. A peer cannot waive his trial by peers, and put himself upon the country, that is upon twelve freeholders; for the statute of *Magna Carta* is, that he shall be tried *per pares q*.

If an indictment is found against a lord of parliament, by a grand jury of freeholders in the court of king's bench; or at the assises before the justices of *oyer and terminer*; it must be transmitted by a writ of *Certiorari*, into the court of parliament: or in it's recess,

*o* 1 Hale P. C. 349.

*p* 2 Sta. Tri. 573.

*q* 3 Inst. 30. Resolved by all the judges in Lord Dacres's case. Kelyng. 56.

expressly

expressly into the court of the lord high steward *r.*

The next thing to be considered is *Process.* the *process* upon the indictment or information. If the defendant is in custody before the finding of the indictment, the next step is the arraignment. But if he absconds or secretes himself, still an indictment may be preferred against him in his absence, and if it is found, process issues to bring him into court.

Upon an indictment, the process issues immediately on its being found; but upon an information, it does not issue, till after conviction.

The first process is a *capias*. At common law in cases of treason, there was but one *capias*; and as this has not been altered by statute, upon a *non est inventus* returned, an *exigent* is awarded, in order to proceed to outlawry *s.*

*r* 3 Inst. 38. 3 Woodeson's Laws of England. 593.

*s* 2 Hale P. C. 194.

But if the indictment is originally taken in the king's bench, the 6 Hen. 6. c. 1. specially provides, that before any *exigent* awarded, the court shall issue a *capias* to the sheriff of the county where the indictment is taken, and another to the sheriff of that county where the defendant is named in the indictment; having fix weeks time or more before the return; and after these writs returned the *exigent* to issue as before *t*.

And by the same statute, if any *exigent* is awarded, or outlawry pronounced, against persons so indicted, it is utterly void.

A *capias* and *exigent* may issue against a lord of parliament: although in civil cases they cannot *u*.

If the offender is out of the realm, the process is of the same effect, as if he was resident in the realm *v*.

*t* 2 Hale P. C. 195.

*u* Id. Ibid. 199.

*v* Com. Dig. tit. Indictment, p. 513. See the process of outlawry, in Tidd's Practice of the court of King's Bench, part 1. c. 4.

The punishment for outlawries, upon indictments for misdemeanors, is the same as for outlawries in civil actions. But an outlawry in treason amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender was found guilty by his country. His life however is under the protection of the law *w*.

The next proceeding is the arraignment, but previous to this, and the trial, the prisoner is entitled to many important privileges, conferred upon him by the 7 *Wil.* 3. *c.* 3; which is the standard for regulating trials, in cases of treason and misprision.

By section 1. of this act, the prisoner is to have a true copy of the whole indictment, but not the names of the witnesses, delivered to him five days at least before the trial; in order to ad-

Copy of  
the in-  
dictment,  
and pan-  
nel.

*w* 4 *Blac. Com.* 319.

vise



vise with counsel thereupon, to plead and make his defence: if his attorney or agent requires the same, and pays the officer a fee, not exceeding five shillings, for writing the copy of such indictment. And now, since the decease of the late pretender, by 7 An. c. 21. s. 11. a list of the witnesses to be produced on the trial, and of the jurors, impannelled, containing respectively their names, professions, and places of abode, is to be delivered together with the copy of the indictment, to the party indicted, ten days before the trial, in the presence of two or more credible witnesses. Though the act mentions ten days before the trial, yet it must mean before the *arraignment*; because the prisoner pleads *instantly* upon the arraignment \*.

At common law no prisoner in capital cases, was allowed a copy of any of the proceedings. Many prisoners have in-

\* 2 Doug. 590.

fisted on a copy of the whole indictment, before this privilege was granted, but it was constantly denied them. Lord *Preston* upon his trial insisted it had been granted to Lord Ruffel, but chief justice Holt observed, he was counsel for Lord Ruffel, and advised him not to demand it *y*. In the case of *Charnock*, whose trial came on after passing the act, but before it took effect, a copy of the indictment was denied. Charnock insisted he was within the reason and equity of the act; but the court told him, he was tried not by equity, but by law *z*.

The reason of the copy being delivered is, that the prisoner may know his charge, and accordingly prepare his defence. But he will not be suffered to inspect the rest of the record; or to have the *venire facias* read, which is

*y* 4 Sta. Tri. 416.

*z* Id. 563.

only

only to summon the jury, and bring them to the bar *a*.

Though the act mentions only the copy of the indictment, yet the prisoner ought to have a copy of the *caption* also, which is frequently as necessary for pleading as the other. This is now the constant practice. But if the prisoner pleads without a copy of the caption it is too late to offer an objection *b*.

If there is any objection to the copy, as if it does not appear before whom the indictment was taken, or that it was taken at all, or in what place, this must be objected to before the plea. For the copy is given the prisoner to enable him to plead, therefore, by pleading, he admits that he has had a copy, sufficient for the purpose intended by the act *c*.

The reason of giving the prisoner a copy of the pannel is, that he may en-

*a* 6 Id. 323, 324.

*b* Fost. 229, 230. So resolved upon Gregg's case, M. S. Rep. 5 Bac. Abr. 149.

*c* 4 Sta. Tri. 668.

quire

quire into the characters and qualifications of the jury, and make what challenges he thinks fit. But the copy may be delivered *antecedent* to the pannel returned by the sheriff. For if he has a copy of the pannel arrayed by the sheriff, which is afterwards returned into court, and there is no variation from it, the end and intent of the act is entirely pursued *d.*

*d* 4 Sta. Tri. 663, 664. 2 Doug. 590. Upon the indictment of Lord George Gordon, upon the motion of the attorney general, a rule was granted for delivering to the prisoner a copy of the indictment, &c. ten days before the arraignment, in consequence of the provision of the 7 An. c. 21. s. 11. the rule was drawn up in the following words.

Middlesex,	}	" It is ordered that the sheriff
The King against		of <i>Middlesex</i> do forthwith de-
George Gordon esq.		liver to Mr. <i>Chamberlayne</i> , the
commonly called		solicitor for the prosecutor, a
Lord George Gordon.		list of the jury <i>to be returned</i> by
		him, for the trial of the prisoner,
		mentioning the names, profes-
		sions, and places of abode, of such jurors, in order
		that such list may be delivered to the prisoner, at the
		same time that the copy of the indictment is delivered
		to him—on the motion of Mr. <i>Attorney General</i> —by
		the Court." 2 Doug. 591. in notis.

The

The copy and the pannel must be delivered ten days before the trial, exclusive of the day of delivery and the day of arraignment. These points have been long settled. And if the last day is on a Sunday, it must be exclusive of that day also *c.*

Counsel.

The prisoner is allowed to make his defence by *counsel*. And the court is authorised to assign him counsel, not more than two in number, who shall have free access to him at all seasonable hours. The counsel are to assist him throughout the trial, to examine his witnesses, and to conduct his whole defence, as well in points of fact, as upon questions of law.

This is a great indulgence. For at common law no counsel was allowed upon the general issue, in any capital crime whatever; except some doubtful question of law arose, proper to be debated. In the cases of *Charnock*

*c.* Foster 230.

and



and others, for the assassination plot, whose trials came on before the act took effect, but after it had passed, counsel was refused *f*. And in Sir William *Parkins's* case, who was tried the day before the act took place, the court refused to assign counsel; observing that they could not alter the law, but were bound to conform to it, as it is at present, not what it will be to-morrow *g*.

Upon the trial of Lord *George Gordon*, a motion was made that counsel might be assigned the prisoner. Mr. justice Buller doubted, whether the application ought not to be made, by the prisoner himself, the words of the statute being "upon his or their request;" But the attorney general consenting, the motion was allowed, and two counsel were assigned *h*.

*f* 4 Sta. Tri. 563.

*g* Id. 431.

*h* 2 Doug. 591.

Though

Though the benefit of the act of William does not extend to impeachments in parliament, yet by the 20 G. 2. c. 30. it is enacted, that if any person is impeached by the commons of Great Britain of any high treason, whereby corruption of blood may ensue; or for misprision of such treason; he may make his defence by counsel, not exceeding two, who are to be assigned on application of the parties impeached, at any time after the articles of impeachment are exhibited by the commons.

Arraign-  
ment.

The *arraignment* is the calling the prisoner to the bar of the court, to answer the matter charged in the indictment. He must be brought to the bar without irons, unless there is danger apprehended of his escape. *Laver* stood at the bar in irons, but he was called upon only to plead. And the court said, upon his trial he ought not to be *in vinculis i.*

i Laver's case 1722. 6 Sta. Tri. 230, 231.

Upon

Upon the arraignment, the indictment being read, it is demanded of the prisoner what he saith to the indictment; who either confesses, stands mute, pleads, or demurs; if he confesses, the court has nothing to do but to record the confession and award judgment. If he stands mute, through obstinacy, it is equivalent to a conviction by verdict or confession *k*. In the case of *Waller* and *Fleetwood*, the regicides, the clerk had recorded their plea of not guilty; but a confession was afterwards made and allowed by the court *l*.

The defendant then either pleads, or Plea. demurs to the indictment. Pleas are to the jurisdiction of the court, in abatement, or in bar.

A plea to the *jurisdiction* is where the indictment is taken before a court, that

*k* 2 Haw. P. C. 464.

*l* Kelyng. 11.

K

has

has no cognizance of the offence. *Fitzbarris* in the court of king's bench, pleaded to the jurisdiction of the court, that he was impeached of high treason, by the commons of England in parliament, before the lords, and that the impeachment was still in force. But the court after taking time to consider, held that the plea was insufficient, to bar the court of its jurisdiction *m*.

Lord *Macguire* an Irish peer pleaded his privilege of peerage, but the court resolved he might be tried here *n*.

Lord *Preston* pleaded his peerage, at the Old Bailey, as a bar to the jurisdiction; the court told him he must pro-

*m* 33 Car. 2. 3 Sta. Tri. 259, 260. 4 Id. 167. The objections to the plea were that the prisoner ought to have produced the record of the impeachment, and that as it was a plea of impeachment for high treason generally, it was naught. Neither could the prisoner be admitted to make an averment in the plea, that the treason in the impeachment and that in the indictment was the same.

*n* 1 Sta. Tri. 950. 4 Id. 414.

duce

duce his patent of peerage. The plea was over-ruled, for Lord Preston had disclaimed his right of peerage in the house of lords.

Lord *Delamere* was indicted for high treason, before the lord high steward, during a prorogation of parliament, and pleaded to the jurisdiction of the court, that as the parliament was not dissolved he ought to be tried by the whole body of the peers; the plea was over-ruled o.

A plea in *abatement* is principally for a *misnomer*. *Martyn*, his name being so written in the indictment, pleaded that his name was *Marten*, but the court agreed that as he was known by the name of *Martyn*, it was sufficient p.

The 7 *Wil.* 3. sec. 9. provides, that the indictment shall not be quashed for mis-writing, mis-pelling, false or im-

• 4 Sta. Tri. 212. 215.

p Kelyng. 12.



proper Latin, unless the exception is taken before any evidence is given.

Pleas in  
bar.

Pleas in *Bar* are general or special. The general issue is not guilty. Upon which the defendant is not merely confined to evidence in negation of the charge, but may offer any matter in justification or excuse. In short the general issue goes to say, that the prisoner under the circumstances, has not been guilty of the crime imputed to him.

In cases of libels, the general issue is not guilty. Upon which the jury may take into consideration, not solely the facts arising, but the law also. For the defendant's plea is not confined to the publication of the *innuendos*, but extends to the question, whether the publication be criminal or not *q*.

*Special*

*q* The 32 Geo. 3. c. 60. is "an act to remove doubts respecting the functions of juries in cases of libels."

*Special* pleas in bar are such as preclude the court from discussing the merits of the indictment, either on account of a *former* acquittal, or of some subsequent matter, operating in discharge of the defendant *r.*

The plea of *autrefois acquit*, or a former acquittal, is a good bar to the indictment, if it is an acquittal for the same treason, and the defendant is the same person. The record of the former indictment and acquittal must be shewn *s.* But it is not necessary to produce it immediately; because it is pleaded in bar, and he that pleads it hath neither the custody nor property of it. If there is a variance between the record of the former acquittal, and

"libels." Now, no doubts have ever existed. The jury might have returned a general verdict upon the whole matter put in issue; and so the court has frequently told them: the law of libels is therefore in *statu quo.*

*r* 3 Inst. 213. 2 Hale P. C. 241.

*s* 2 Hawk. P. C. 561.

the indictment which is pleaded to either in time, place, or addition, this may be helped by proper averments *t*. An acquittal in any court, is a good bar of any subsequent prosecution, even in the highest court; provided the inferior court had a jurisdiction of the cause *u*.

*Auterfoits convict* or *attaint*, a former conviction or attainder, are special pleas in bar, but are never good, except when a second trial would be superfluous *v*. A man attainted of treason by outlawry, cannot be indicted *de novo*, for the same treason, till the outlawry is reversed: for *auterfoits attaint* of the same treason is a good plea, although the record is erroneous *w*. An attainder of felony is no bar to an indictment for treason. If a man attainted of felony, commits high treason

*t* 2 Hawk. P. C. 525.

*u* Id. 529.

*v* Staund. P. C. 107.

*w* 3 Inst. 212. 213.

before

*before* the attainder, he shall answer nevertheless for the treason; for the king is entitled to forfeitures, and the judgment is different. So also, if he commits treason *after* the attainder; for it is a higher crime *x*.

A *pardon* may be pleaded in bar, either on the arraignment, or in arrest of judgment, or in bar of execution. By the 13 Ric. 2. stat. 2. c. 1. no pardon of high treason is good, unless the crime is expressly specified. And it was an objection to Sir Walter Raleigh's pardon, that there was no pardon of treason specifically mentioned; and the court could not take it by implication *y*. But if the king was unapprized of the heinousness of the crime, or how far the party stood convicted on the record, the pardon is void, as obtained by imposition *z*.

*x* 3 Inst. 212, 213.

*y* 1 Sta. Tri. 227.

*z* 2 Hawk. P. C. 542.

If it is a pardon granted by parliament, the court is bound *ex officio* to take notice of it, inasmuch that it cannot proceed against the prisoner, though he does not plead it, but endeavours to waive it; except it appears that the person or crime is excepted in the act *a*. But a particular pardon under the great seal, must be pleaded specially, and at a proper time. For if a man has a pardon in his pocket, and pleads the general issue, he waives the benefit of it. If he pleads, without producing the pardon, the court may at discretion indulge him a farther day to put in a better plea, when he may perfect the plea, by producing the charter *b*.

*Ratcliffe* being attainted of treason, escaped; but was retaken, brought to the bar and arraigned. Upon which he pleaded, that he was not the person mentioned in the record before the court. This issue was tried by the jury,

*a* 2 Hawk. P. C. 560.

*b* Id. 561.



who gave a verdict, that he was the same person. Upon this, the prisoner offered to plead the act of general pardon. But the court declared, that having once pleaded in bar of execution, and the plea having been falsified by the verdict, it was peremptory; and that the verdict was conclusive *c.*

A pardon cannot be pleaded in bar to a parliamentary impeachment. When the Earl of *Danby*, in the reign of Charles the Second, was impeached by the house of commons, of high treason and other misdemeanors, he pleaded the king's pardon, as a bar to the impeachment: but the commons resolved, that there was no precedent where a pardon was ever granted, pending an impeachment; and that Lord *Danby's* pardon was illegal and void *d.* It was afterwards enacted by the act of settlement, 12 and 13 W. 3. c. 2. "that no pardon under the great

*c* M. 20 Geo. 2. K. B. Foster 41, 42, 43.

*d* 2 Sta. Tri. 739, 740.

"feal

"seal of England shall be *pleadable* to  
 "an impeachment by the commons  
 "in parliament." But after the im-  
 peachment has been heard and deter-  
 mined, the king has then the power of  
 pardoning; for after an impeachment  
 and attainder of the six rebel lords in  
 1715, three of them were pardoned.

Sir H. Vane, justified that what he  
 did was by authority of parliament;  
 that the king was out of possession of  
 the kingdom; and that the parliament  
 was the only governing power. But  
 this was over-ruled by the court *e.*  
 Neither can a man plead by way of  
 justification, that what he did was *se*  
*defendendo f.*

A man may also plead specially the  
 statute of limitations, 7 Wil. 3. c. 3.  
 f. 5. that no man shall be indicted,  
 tried, or prosecuted for any treason;  
 unless within three years after it is

\* Kelyng. 14.

f 2 Hale P. C. 258.

committed. There is an exception however in the act, of persons who are guilty of designing, endeavouring, or attempting any assassination of the king, by poison, or otherwise.

A *demurrer* admits the facts stated in the indictment, but refers the law arising upon them, to the determination of the court. As if the prisoner insists that the fact as stated is no treason. Demurrer

After plea the jurors are sworn, unless challenged by the party.

Challenges are allowed by the law, for the purpose of having an indifferent trial: and are either peremptory, or for cause shewn. Challenge

A peremptory challenge of thirty-five jurors, is at this day allowable in cases of high treason. For though the 33 Hen. 8. c. 23. enacts, That in cases of high treason or misprision of treason, a pe-

a peremptory challenge shall not be allowed. Yet the 1 and 2 Phil. and Mar. c. 10. enacts, That all trials for any treason, shall be according to the order and course of the common law, which allowed this privilege g.

But if a man is outlawed, and brings a writ of error upon the outlawry, and assigns an error in fact, whereupon issue is joined, he cannot challenge peremptorily, or without cause b. If the prisoner peremptorily challenges above thirty-five, and insists upon it, and will not leave the challenge, it amounts to a *nihil dicit*, and judgment of death may be given i.

Upon the trial of Sir H. Vane, it being suspected that he might challenge peremptorily, and defeat his trial for that day, as there were only twenty-four

g 3 Inst. 27. 2 Hale P. C. 269. 7 and 8 Wil.

3. c. 3. f. 2.

b Id. 267.

i Id. 268.

jurors

jurors returned, the sheriff returned sixty. For upon search in the crown office, it appeared that upon trials on the crown side for criminals, the sheriff might be commanded to return any number the court pleased. The like may be done upon a commission of *oyer and terminer* *k*.

Upon the trial of the regicides it was resolved, that if several prisoners are put upon one jury, and they challenge peremptorily and sever in their challenges, he who is challenged by one is drawn against all; because the pannel being joint, one juror cannot be drawn against one, and serve for another. It was therefore agreed, to sever the pannel, and return the same jury for every prisoner; and then as they were tried severally, a juror being challenged by one, was not disabled from serving another. And afterwards upon the trial of *Harrison* and others, who challenged

*k* Kelyng. 16.



peremptorily, and severed in their challenges, particular jurors, the pannel was severed *l*.

Challenge for cause is to the array or poll.

There ought to be a sufficient number of hundredors returned; though there is no instance of any challenge for default of hundredors *m*.

By the 33 Hen. 8. c. 12. For treasons committed in the king's household, and tried before the lord steward, all challenge, except for malice, is taken away *n*.

A juror may be challenged for not being a freeholder; or not having within the same county, freehold or copyhold lands to the clear yearly value of ten pounds.

*l* Kelyng. 9, 10.

*m* 2 Hale P. C. 272.

*n* Id. *ibid*.

The 9 Geo. 1. c. 8. Though principally regarding counties at large, has been held to extend to trials in *London* for high treason *o*.

An *alien* cannot make a challenge to the array, that the jury should be *de medietate*, or half foreigners, this indulgence not being granted in treasons; for aliens are improper judges of the breach of allegiance *p*.

None of these challenges are allowed in impeachments, or trials by peers. For the peers are not only triers of fact, but in some respects triers of law, and judges *q*.

After the jury are sworn, and the indictment opened, the next step is proceeding to evidence of the charge.

*o* 6 Sta. Tri. 58. *Francia's case*. Id. 229. *Lay-er's case*.

*p* So resolved upon the trial of *Mary Queen of Scots*. *Dyer* 145. and *Sherley's case* id.

*q* 2 Hale P. C. 275.

It

It is enacted by the 7 and 8 Wil. 3. c. 3. f. 2. that no person shall be tried for high treason or misprision, except upon the oaths of two lawful witnesses; either both of them to the same overt act, or one of them to one, and the other to another overt act of the same treason; unless the prisoner willingly, without violence, in open court, confesses the same; or stands mute; or refuses to plead; or in cases of high treason peremptorily challenges more than thirty-five of the jury.

At common law, one positive witness was sufficient. But several statutes previous to the act of William required two; and upon the trial of the regicides, and upon Lord Stafford's trial, it was a point beyond all doubt that the law required two; and that they must be both believed by the jury. But a collateral fact not tending to the proof of the overt acts, may be proved by one. This difference between the proof of overt acts and of collateral facts

facts was taken by Lord Holt in the case of Captain Vaughan, who called witnesses to prove that he was born in the dominions of the French King; the counsel for the crown called witnesses to prove that he was born in Ireland; and upon Vaughan's counsel insisting that there was but one credible witness to that fact, Holt observed there need not be two witnesses to prove him a subject, because that was not an overt act r.

If two distinct heads of treason are alleged in one bill of indictment, one witness produced to prove one of the treasons, and another witness to prove another of the treasons, are not two witnesses to the same treason, according to the intent of the act.

As to the confession, there have been doubts whether the statute requires a confession upon the arraignment of the

r 5 Sta. Tri. 29.

L

party;

party; or a confession taken out of court by a person authorized to take such examination. Evidence of a confession proved upon the trial by two witnesses has been held sufficient to convict, without farther proof of the overt acts. This point is however not clearly settled. But such confession out of court is evidence admissible, proper to be left to a jury, and will go in corroboration of other evidence to the overt acts. In the case of Smith who was indicted in June 1709 for adhering to the queen's enemies, alienage was the defence, and his confession, that he was an Englishman born, was allowed to be admissible evidence.

In Sir John Fenwick's case, who had been indicted on the oaths of two witnesses at the Old Bailey, but upon the disappearance of one, it being conjec-

s M. S. report of John Berwick 1746. Foster 241. It was held sufficient by the judges who sat upon the commission in the North in the same year.

tured



tured that the single testimony of the other would not be sufficient to convict him, an act of parliament was made expressly to attain him of treason *t.*

In an indictment for compassing the king's death, the being armed with a dagger for the purpose of killing the king, was laid as an overt act; and being armed with a pistol for the same purpose, as another overt act; it was held, that proving one overt act by one witness, and the other by a different witness, was good proof by two witnesses within the meaning of the act.

Upon a trial at bar, the evidence of a witness was objected to, because he had judgment of the pillory. But the court held, that as he had been pardoned, he was a new man, and his evidence admissible *u.* The king cannot

Evidence.

*t* 5 Sta. Tri. 45, 46. 8 Wil. 3. c. 4.

*u* R. v. Crosby, alias Philips, 1 Ld. Raym. 39.

give evidence by his great seal, or *ore tenus*, for he would then give evidence in his own cause *v.*

An overt act not laid may be given in evidence, if it be a direct proof of any of the overt acts that are laid *w.* And after the overt act has been proved in the proper county, evidence of overt acts, though done in foreign counties is admissible; and such evidence was given upon most of the trials after the rebellions of 1715 and 1745 *x.*

Hearsay is no evidence. But it may be admitted in corroboration of a witness's testimony *y.*

The informations of justices of the peace in cases of high treason, cannot be read in evidence, because high treason is not within their commission.

*v* 2 Hale P. C. 282.

*w* Foster 9.

*x* Id. 10.

*y* Gilb. Law of Evid. 890.

But

But Sir Matthew Hale doubts whether they are not allowable to be given in evidence *z*.

Similitude of hand-writing is of itself no evidence in criminal, though it is in civil cases. The distinction seems to be this ; that writing being the life and soul of commerce, the comparison of hands is resorted to as the only distinguishing criterion of the transactions of each individual, and the similarity induces a presumption which is decisive, till overturned by contrary evidence. But in criminal prosecutions, where comparison of hands is the only evidence, since they may be either counterfeited, and are founded on a likeness which may easily fail, there is only one presumption against another, which weighs nothing *z*.

Upon the trial of the seven bishops for a libel, the court was divided in

*z* 2 Hale P. C. 286.

*z* 1 Gilb. Law of Evid. 51, 52.

opinion,

opinion, whether similitude of hands was evidence to prove that the defendants signed the paper charged against them as a libel *b*. The paper so fatal to Algernon Sidney was not proved by any one witness to have been written by him. Therefore, since the reversal of his attainder by act of parliament in 1689, it has been generally holden, that similitude of hand-writing is not of itself evidence in any criminal case, whether capital or not capital. However, papers found in the custody of the prisoner *c*, and proved to be his hand-writing, by persons who have seen him write, may be read in evidence against him *d*.

In the king and *Crosby*, upon the defendant's producing the copy of the act of parliament for the reversal of the attainder of Algernon Sidney, evidence

*b* 4 Sta. Tri. 342. 345.

*c* 2 Hawk. P. C. 607.

*d* 1 Burr. 644. Henfey's case. See also several other cases there cited.

by

by comparison of hands, to prove the writing of treasonable papers, was refused to be admitted. But in this case the king's counsel had no other evidence to produce, therefore it is no exception to the rule laid down *c.*

The same rules of evidence are observable in cases of parliamentary impeachments, as in the ordinary courts of judicature.

The prisoner is entitled by the act to have a similar process of the court to compel witnesses to appear for him, to that which is usually granted to compel witnesses to appear against him. And by the 1 An. stat. 2. c. 9. s. 3. the witnesses on the behalf of the prisoner, before they give evidence, are to take an oath to depose the whole truth, &c. as the witnesses for the crown are obliged to do. And if convicted of wilful perjury in their evidence, they shall suffer the usual punishment.

*c.* 1 Ld. Raym. 40.

The



Verdict.

The jury must be unanimous, and give their verdict in open court. No privy verdict can be given *f.*

Upon the trial of peers, in the court of the lord high steward a major vote is sufficient either to acquit or condemn; provided that vote amount to twelve or more *g.* Therefore it has been usual to summon not less than twenty-three peers. The lord high steward had formerly a power of summoning as many as he thought proper, and those only that were summoned sat upon the trial, but this throwing too great a power into the hands of the crown; the 7 Will. 3. c. 3. f. 11. enacts, that upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament, shall be duly summoned, twenty days at least, before every such trial, to appear and vote thereon. And every lord appearing shall vote at the trial, first taking the

*f* 2 Hale P. C. 300.

*g* Kelyng. 56, 57.

oaths of allegiance and supremacy, and subscribing the declaration against Popery. But the act does not extend to any impeachment or other proceedings in parliament.

These last words of the act are very general, and may seem to exclude every proceeding in full parliament, for the trial of a peer in the ordinary course of justice. But that construction was rejected in the cases of the Earls of Kilmarnock and Cromartie, and Lord Balmorino, the lord high steward informed them they were intitled to the benefit of the act in its full extent. By voting is meant, voting throughout the trial, as a competent judge upon every question that arises, and particularly in the grand question of condemnation or acquittal. Upon this last question, being a case of blood, the bishops have no vote. This act therefore does not extend to give the lords spiritual a right, which they never had before *b*.

*b* Foster 247, 248.

Judgment.

After the trial and conviction unless the prisoner has any thing to offer in *arrest* of judgment, the judgment of the court is awarded, unless acquitted. We have already noticed what these judgments are. Upon judgments of death or outlawry, the prisoner is attainted.

The consequences of attainder are forfeiture of all lands and tenements; and corruption of blood. Corruption of blood annihilates the powers of inheritance both as to the offender and as to others. But the 17 Geo. 2. c. 39. §. 3. enacts that after the death of the sons of the late pretender, no attainder of treason shall extend to the disinheriting any heir, nor to the prejudice of any other person, except the offender himself.

F I N I S.

